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No. 14495.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARCELINO CASARES-MORENO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
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Chief of Criminal Division,
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BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on January 27, 1954, under Section 1326 of Title 8, United States Code. The indictment charged appellant with being an alien who, having been deported from the United States on December 31, 1953, attempted to enter the United States on January 3, 1954.

On February 17, 1954, appellant was arraigned in the Southern Division of the Southern District of California, and entered a plea of not guilty. On February 26, 1954, appellant's Motion for a Change of Venue to the Central

Division of the Southern District of California was granted. On April 20, 1954, jury trial was begun in the United States District Court for the Southern District of California before the Honorable Ernest A. Tolin. On April 22, 1954, the jury found appellant guilty as charged in the indictment. On May 17, 1954, appellant was sentenced to 185 days' imprisonment and Judgment was entered accordingly. Appellant appeals from this Judgment.

The District Court had jurisdiction of this cause of action under Section 1326 of Title 8, United States Code and Section 3231 of Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.
STATUTE INVOLVED.

The indictment in this case was brought under Section 1326 of Title 8, United States Code, which provides in pertinent part:

> "Any alien who—
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States * * *
>
> shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1000, or both."

III.
STATEMENT OF THE CASE.

The indictment returned on January 27, 1954, charges that the appellant was an alien who was deported from the United States to Mexico through the port of San Ysidro, California, on or about December 31, 1953. Thereafter, on or about January 3, 1954 near Calexico, Imperial County, California, appellant unlawfully attempted to enter the United States. On February 17, 1954, appellant appeared in the Southern Division of the Southern District of California where he was arraigned and entered a plea of not guilty. On February 26, 1954 appellant, through his attorney, J. Robert O'Connor, Esquire, moved the Court for a change of venue to the Central Division of the Southern District of California, and his Motion was granted.

Trial was begun on April 20, 1954, before the Honorable Ernest A. Tolin, United States District Judge, with a jury. Appellant was represented at the trial by his attorney, Carl Yanow, Esquire. On April 22, 1954, appellant was found guilty as charged in the indictment by the jury, and on May 17, 1954, appellant was sentenced to 185 days' imprisonment.

IV.
STATEMENT OF THE FACTS.

The Government's case in chief, which was not ordered transcribed by appellant, included portions of the files of the Immigration and Naturalization Service relating to appellant. Those records revealed [Govt. Ex. I-A] that appellant was found to be an alien, born in Mexico, and was, in February, 1953, ordered deported pursuant to law.

Ramon Mata-Avalos was called as a witness by the Government. He testified that on or about the date named in the indictment he, accompanied by a woman named Martin and appellant, drove to Tijuana, Mexico. After spending some time there, they drove to Mexicali and attempted to enter the United States at Calexico. They were apprehended at the Immigration Border Station at Calexico. The testimony of an Immigration officer tended to show that appellant had entered from Mexico.

Appellant testified on his own behalf and denied that he was an alien. He claimed that he was born on September 21, 1906 [Tr. p. 3]. He stated that he learned this from members of his family [Tr. pp. 14-15]. Appellant testified that in 1936 he began a proceeding in the Superior Court of Los Angeles County in the name of Miguel Casares to establish his birth record [Tr. p. 4], and a birth certificate was entered [Tr. p. 5, Deft. Ex. B]. He produced a baptismal record from the Plaza Church for Miguel Casares [Tr. pp. 3-4, Deft. Ex. C].

Appellant further testified that he did not go to Mexico on or about December 31, 1953, as charged in the indictment [Tr. p. 6]. He testified that on the night of January 2, 1954, he visited two cafes in Los Angeles, at the second of which he met Ramon Mata and Matilda Martin

[Tr. p. 9]. Appellant stated that about 10:30 or 11:00 P. M. he, Mata, and Martin decided to go to the Imperial Valley [Tr. pp. 8-9]. They took appellant's car, with Mata driving, and arrived in Calexico at about 4:00 o'clock in the morning [Tr. pp. 9 and 17]. Appellant further testified that after they arrived in Calexico they attempted to turn the car around near the Border Patrol Station and at that point were stopped by Immigration officers [Tr. p. 10].

On cross-examination appellant testified that he had told the Immigration Service in 1928 that he was a citizen of Mexico [Tr. p. 28]. He stated that in 1935 he was deported to Mexico [Tr. p. 29]. In 1926 appellant applied for a marriage license, using the name Marcelino Casares, and he gave his place of birth as Mexico [Tr. pp. 31 and 32, Govt. Ex. II].

In rebuttal the Government offered a certified copy of a death certificate of Miguel Casares revealing that he died in Santa Ana in April, 1907, at the age of six months. Sarah Lomas was called as a witness by the Government. She testified that she was a half-sister of the appellant and lived in the household of her mother at the time appellant was born [Tr. p. 47]. She testified that appellant was born in Mexico and that she was 14 years and six months old at the time of his birth [Tr. p. 48]. Mrs. Lomas further testified that prior to appellant's birth she had lived with her family in California where a child was born in Santa Ana by the name of Miguel and that Miguel died in Santa Ana while still an infant [Tr. p. 49].

V.
ARGUMENT.

Appellant's sole contention on appeal is that the order of the Superior Court relating to his birth certificate entered in 1936 is entitled to full faith and credit and binding against the World.

The constitutional requirement of full faith and credit found in Article IV, Section 1, of the Constitution applies only to the States, but that doctrine has been adopted by the Congress in Title 28, U. S. C., Section 1378, and made to apply to the Federal Courts. This section states in pertinent part:

> "Records and judicial proceedings or copies thereof so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, territory or possession in which they are taken."

It should be noted that the statute provides that judicial proceedings "shall have the same full faith and credit . . . as they have by law or usage in the courts of such state . . ." If California views the judicial proceedings employed by appellant as not conclusive, then, of course, such proceedings gain no greater stature by virtue of the above-quoted statute. Therefore, the first line of inquiry should relate to what effect such an order of the Superior Court would have in the State Courts of California. It is submitted that under the law of California, the order of the Superior Court would, at most, constitute only *prima facie* evidence of the facts it contained.

A. The State Statute.

Defendant's Exhibit B is a certified copy of a birth certificate recorded in Los Angeles in 1936, pursuant to an Order of the Superior Court [Tr. pp. 5, 37]. In 1929, the California legislature enacted this procedure, and the law as it existed in 1936 may be found in the General Laws of California, 1931, Volume 3, Act 9008. Subsequent amendments up to 1939 did not change the procedure as found in the General Laws of 1931. There are no California cases interpreting this statute, and we must therefore, look to the intent and purpose of the Act.

The Act is entitled "Vital Statistics," and its purpose is described as follows:

> "An act to provide a central bureau for the preservation of records of marriages, births, and deaths, and to provide for the registration of all births and deaths . . ."

Section 21 of the Act relates to the procedure employed by appellant in instituting his action in Superior Court in 1936 and is entitled "Certified Copies of Records. Fees for Searching Files." That paragraph contains a command to Registrars of Vital Statistics to provide certified copies of birth, death and marriage certificates upon application, and provision for a fee for searching the record. As a subtitle to Section 21, is subsection (b). This section is entitled, "Petition to Court to Establish Record Hearing." It provides:

> "If, upon such search it shall develop that for any cause any birth or death, or marriage, occurring in this state was not registered in conformity with the provisions of law in effect at the time when such birth or death or marriage occurred by the filing of the certificate therefor with the local registrar within

> a period of one year from the date of the event, any person beneficially interested in establishing of record the fact of such birth or death or marriage may petition the Superior Court of the County in which such birth or death or marriage is alleged to have occurred for an order judicially establishing such birth or death or marriage."

There follows a provision requiring that such a petition be served upon the District Attorney and the local Registrar of Vital Statistics and notice by publication.

Thus it can be seen that the purpose of the judicial procedure is to establish a *record* of a birth, death, or marriage. It is a procedure available only when the record has not been otherwise maintained according to law. It is a *substitute* for prompt recordation shortly after the event.

A further examination of the statute makes appellant's position even more untenable. It is to be noted that the statute then, and even now, provides that "any person beneficially interested in establishing of record the fact that such birth or death or marriage may petition the Superior Court." Thus, it is not just births, but deaths and marriages as well which may be the subject of this judicial procedure. And the procedure may be initiated by any one "beneficially interested." Does appellant contend that the California legislature intended to permit any person with a beneficial interest to start an action and establish the death of an individual which would be binding upon all the World? Did it intend to create a marriage where none existed? Actions could be maintained under this section in the utmost good faith and the Superior Court could make an order in accordance with the affidavits and proof submitted at that time, but it could

not create a death or marriage where none existed. Neither could it create a birth and it was obviously not the intention of the California Legislature to do so.

Surely a belatedly entered record is not to be given greater weight than one recorded promptly. Section 21 of Act 9008 provides:

> ". . . such copy of the record of a birth or death or marriage when properly certified by the State or local registrar to have been so registered within a period of one year from the date of the event, shall be *prima facie* evidence in all courts and places of the facts therein stated."

Thus, the most that can be said of such a record of birth is that it is *prima facie* evidence of the facts therein contained, and this was the instruction given by the Court.

There are further reasons to support this conclusion. Section 18(a) provides for the correction of errors in records of vital statistics. It states:

> "Whenever, it may be alleged that the facts are not correctly stated in *any certificate of birth,* death, or marriage, *already registered,* . . ." (Emphasis added.)

The section then goes on to provide for the correction of such certificate by affidavit. It should be noted that this means of correcting certificates is available as to any certificate already registered, which of course, includes any certificate registered pursuant to a court order.

These statutory provisions are now codified in the Health and Safety Code and are found in Section 10600 *et seq.* Section 10600.5 was added to the Code in 1939, and it provides for the recordation in California upon an order of the Superior Court of births, deaths and mar-

riages *occurring outside the State of California.* This, too, is evidence that the California legislature at no time intended to give greater weight to a record created by an Order of the Superior Court than is given to one promptly recorded.

The Court in this case properly instructed the Jury as to the weight to be given the birth certificate introduced by appellant. The rule is announced in *Duncan v. United States,* 68 F. 2d 136, 140, where the court says:

> "Where such records are required by law to be kept, a presumption arises that they are an accurate record of the facts, and thus they become *prima facie* proof of the facts required by law to be so recorded."

One further matter should be noted. Appellant introduced the birth certificate, and it was stipulated that the certificate was "entered pursuant to an order of the Los Angeles County Superior Court" [Tr. p. 37]. He did not prove the terms and conditions of the order. Appellant did not establish a judicial finding of birth, but only that a *certificate* was ordered entered.

B. Jurisdiction of the Superior Court.

Assuming, for the purposes of argument, that the California legislature intended such an order of court to be conclusive, the United States would not be bound thereby because it was not a party to the State Court proceedings. The doctrine of full faith and credit under 28 U. S. C. 1378 applies only when the State Court had jurisdiction over the party against whom the State proceedings are asserted. *Standard Accident Insurance Co. v. Doiron,* 170 F. 2d 206. The United States was not a party to appellant's action in the Superior Court in 1936.

The contention in this case is similar to the one made in *Economy Light and Power Co. v. United States,* 256 U. S. 113. In that case the Federal Court was called upon to determine the navigability of the DesPlaines River wherein the United States sought an injunction against the power company to prevent the construction of a dam. In prior litigation between the power company and the State of Illinois, the Supreme Court of that State held that the river was not a navigable stream. The Supreme Court observed at page 123:

> "Of course, the decision does not render the matter *res adjudicata,* as the United States was not a party."

It was basically on this premise that the Court rejected a similar contention in the case of *Ex parte Lee Fong Fook,* 74 Fed. Supp. 68 (remanded on other grounds without comment on this point, 170 F. 2d 245). In that case it was urged upon the Court that a birth certificate entered upon court order was entitled to full faith and credit and binding on the United States. At page 70 the Court said:

> "At the hearing in this Court, petitioner contended, as he did through his counsel before the Board of Special Inquiry, that the decree of the Superior Court of the State of California has established petitioner's birth in the United States, and that it was beyond the authority and power of the Immigration officials to pursue any inquiry as to the decree's validity . . .
>
> "The proceeding authorized by California State law for the establishment of the fact of birth, is not an adversary proceeding, save and except that the statute requires that notice of the hearing be given to the District Attorney of the County wherein the hearing is had. The United States not being a party to such proceeding, nor having consented thereto, is

not bound by the State Court adjudication. Particularly is this so as to the administration of laws of the United States, which it alone enforces. Constitution, Article I, Section 9, Clause 1.

". . . The State Court decree establishing birth is no more conclusive upon the United States as to citizenship or as to the right of entry into the United States than would be the finding of a State Court in a proceeding between private litigants wherein it might be necessary or proper in deciding property or personal rights, to find the date or place of birth of one of the litigants before the court. In my opinion the decree of the State Court is evidence of petitioner's birth place but not conclusive proof of his citizenship."

In the instant case Judge Tolin's Opinion is reported in 122 Fed. Supp. 375, and at page 377 Judge Tolin quotes extensively from the *Lee Fong Fook* case and adopts its language.

A somewhat analogous situation existed in the case of *Heath v. Helmick,* 173 F. 2d 157 (9th Cir.). That case involved a bankruptcy proceeding and one of the assets of the bankrupt's estate had earlier been the subject of a quiet title action in the State Courts of California. The Court observed at page 161:

"When the State Court failed to quiet title of Douillard to Glendale, no issue could have been decided which was binding upon this court, even if that judgment had been pleaded and proved, which was not the case. The parties are not the same. The positions are not identical."

In rem proceedings are an exception to the rule that a judgment is binding only on those who are actual

parties to the action. In *Williams v. United States,* 317 U. S. 287, the Supreme Court declared that divorce decrees, while not *in rem,* "are more than *in personam* judgments" (p. 298), since such decrees involve a status. Appellant in his brief renounces this position in the opening lines of his argument (p. 3). "The argument of appellant is that the State Court decree is an adjudication not of his citizenship but of his fact of birth." While citizenship might be construed as a "status" a determination as to the place of birth could not. Insofar as the Superior Court order purported to establish appellant's citizenship,

> "* * * jurisdiction to adjudicate the citizenship status of a United States resident has never been conferred by Congress on state courts. Consequently, a state court judgment purporting to exercise that jurisdiction cannot to that extent, claim the Federal Courts full faith and credit."
>
> *Ex parte Lee Fong Fook, supra,* pp. 70, 71.

It is a fundamental rule that judicial proceedings are entitled to full faith and credit only when due process of law has been accorded the litigants. As the Supreme Court said in *Old Wayne Mutual Life Association v. McDonough,* 204 U. S. 8:

> "No state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law."

This principle has been recognized also in California, *In re Hampton's Estate,* 127 P. 2d 38, and a later opinion in 131 P. 2d 565. It would seem to be clear from a reading of the statute authorizing the recordation of appellant's birth certificate that the State legislature of Cali-

fornia did not intend it to be a judicial proceeding entitled to full faith and credit, but even if the contrary is assumed, it would, as Judge Tolin observed, "most probably, run afoul of constitutional prohibitions."

Facts relating to births, deaths and marriages often have a determinative effect upon contractual rights, property rights and rights of inheritance. This alone would seem to negative any legislative intent that the *ex parte* procedure used to establish an unrecorded birth or death or marriage, as a proceeding binding against the world. In any event, it would infringe the constitutional requirement of due process as to third persons not a party to the petition to establish such a record.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief of Criminal Division,

CECIL HICKS, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 14496

United States
Court of Appeals
for the Ninth Circuit

EDWIN B. SWOPE, Warden, U. S. Penitentiary, Alcatraz, California,

Appellant,

vs.

SELVIE W. WELLS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 10-8-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Petitioner and Appellee.

In the District Court of the United States for the Northern District of California, Southern Division

No. 33471

SELVIE W. WELLS,

Petitioner,

vs.

E. B. SWOPE, Warden,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

April 7, 1954

The verified petition of Selvie W. Wells shows:

That your petitioner is unlawfully imprisoned and restrained of his liberty by E. B. Swope, Warden of U. S. penitentiary at Alcatraz, Calif., in the County of San Francisco, in the State of California; under color of authority of a judgment of conviction, sentence and a mittimus irregularly issued from and out of and under the hand and seal of the United States District Court for the Western District of Texas.

That the body of the petitioner, and the said E. B. Swope, are all and each of them within and subject to the jurisdiction of this, the above-entitled and named court; and that this, the said United States District Court for the Northern District of California and the Southern Division thereof do have jurisdiction of this habeas corpus proceedings, including the judicial power and authority to issue and to grant the writ prayed herein and to dis-

charge the petitioner from unlawful imprisonment, double jeopardy, and restraint of his liberty under the provisions of law, to wit: Title 28 U.S.C.A. Sections 451, 452, 453 on to 463; new law title 28 Sections 2241, 2243; and Barrett vs. Hunter "10 Cir." 180 F2D 510; United States vs. Morgan, 74 Supreme Court 247, at page 252, and Booth vs. United States "9 Cir." 209 F2D 183, at page 184, Chief Judge Denman, said relief under habeas corpus is limited to release from present detention.

That annexed hereto and made a part hereof as though fully copied herein are the following certified documents:

1. Indictment, judgment of conviction, and sentence styled United States of America, plaintiff, vs. Selvie Winfield Wells.

Grounds for Granting the Writ

Your petitioner has two sentences for the robbery of one bank a violation of Title 12 588B, Sections 588B(A) and 588B(B) please see Indictment and Sentence.

Petitioner has had his legal twenty-five (25) year sentence served since February 22, 1954.

Res judicata does not apply to petitioner,

Kerr v. Squire,
151 F2D 308 "9 Cir."

Since May 6, 1942, the time of the vacations of sentences on counts one (1) and two (2) See

Wells v. United States,
"5 Cir." 124 F2D 334.

All District Courts and Courts of Appeals "except Fifth Circuit" have rendered new interpretations of the ruling in Holiday v. Johnston, 313 U. S. 342 61 Sct. 1015; which have resulted in a clarification of that ruling and of the bank robbery act, and petitioner believes and contends that he is now entitled to have his discharge, as he is in double jeopardy.

Petitioner believes and contends:

That the bank robbery act does not provide for separate offenses but for different degrees of the one offense, and that only one sentence may be imposed;

Holiday v. Johnston,
Supra;

Hewitt v. United States,
"8 Cir." 110 F2D 1;

Sinunov v. United States,
"6 Cir." 162 F2D 314;

McDonald v. Johnston,
"9 Cir." 149 F2D 768;

Dimenza v. Johnston,
"9 Cir." 130 F2D 465;

Holbrook v. United States,
"8 Cir." 136 F2D 649.

That count three charges the aggravated degree of the offense charged in count four and that the twenty-five (25) year sentence thereon is the only valid sentence;

That the offense charged in count four is a lesser

included offense, and that the twenty (20) year sentence thereon is excessive and void and should be vacated, because petitioner is being twice placed in jeopardy for the same offense, and is serving two sentences for the same offense, in violation of the Fifth Amendment of the Constitution.

"Prayer"

Petitioner respectfully prays the following:

1. That his honor grant me permission to file this petition in my hand writing;

2. That this Honorable Court enter an order commanding the said E. B. Swope, Warden, appear before this Court, "With petitioner," and show cause, if any he has, why a writ of habeas corpus should not be issued and granted, and petitioner discharged from custody, as prayed for;

3. That this Honorable Court upon the filing of the return to said order to show cause, grant the petitioner permission to traverse it orally;

4. And after a summary of the proceedings therein, discharge petitioner from further restraint of his liberty as law and justice requires.

Respectfully submitted,

/s/ SELVIE WINFIELD WELLS,
Petitioner.

United States Penitentiary, Alcatraz, California, April 7, 1954.

Duly verified.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that Edwin B. Swope, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 21st day of April, 1954, at the hour of 9:30 o'clock a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: April 8, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now Edwin B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, and moves to dismiss the petition for habeas corpus herein for the following reasons:

(1) The issues raised by petitioner in the present action have been previously adjudicated by the Court of Appeals for the Fifth Circuit in the case of Wells v. United States, 124 F. 2d 335; hence, petitioner's present claim is res adjudicado;

(2) Petitioner has heretofore petitioned for a writ of habeas corpus on the same grounds as the petition herein in the case of Wells v. Swope, No. 31272, in the United States District Court for the Northern District of California, Southern Division. United States District Judge Louis E. Goodman dismissed the petition on the grounds that under Title 28, Section 2255, United States Code, as interpreted in the cases of Winhoven v. Swope (9th Cir.), 195 F. 2d 181, and Jones v. Squier (9th Cir.), 185 F. 2d 179, this Court was without jurisdiction to entertain a petition for a writ of habeas corpus;

(3) The petition fails to state a claim upon which relief can be granted;

(4) Attached hereto and made a part hereof are

copies of the judgment and commitment of the United States District Court for the Western District of Texas and the modified judgment and commitment of that court.

Dated: April 29, 1954.

LLOYD H. BURKE,
United States Attorney,

By .....,
RICHARD H. FOSTER,
Assistant U. S. Attorney,
Attorney for Respondent.

United States District Court, Western District of Texas, San Antonio Division

No. 11848—Cr.

THE UNITED STATES,

vs.

SELVIE WINFIELD WELLS.

JUDGMENT AND COMMITMENT

Wednesday, April 13th, A.D. 1938

This day this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, Selvie Winfield Wells, in his own proper person, and thereupon the said defendant was arraigned at the bar of the court, when both parties announced ready for trial; and a jury having been waived, and the indictment having been

read to the defendant, he, for himself, in open court, voluntarily entered his plea of guilty to the charges contained therein.

Wherefore, it is considered and adjudged by the Court that the defendant, Selvie Winfield Wells, is guilty, as confessed in his said plea of guilty, of the offense of having, on or about the 5th day of March, 1938, in Caldwell County, Texas, within the Austin Division of the Western District of Texas, by putting Addie Walker in fear, feloniously taken from the presence of the said Addie Walker Two Thousand Four Hundred Eighty-two Dollars and Twenty-five Cents ($2,482.25) in money, which said money than and there belonged to the Citizens State Bank, Luling, Texas, and which said bank was then and there a banking association incorporated under the laws of the State of Texas, and was then and there an insured bank within the meaning of the provisions of Section 2 64, Title 12, United States Code, relating to the Federal Deposit Insurance Corporation, as charged in the first count of the indictment; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count of the indictment herein, assaulted Addie Walker, as charged in the second count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count of the indictment herein, put the life of Addie Walker

in jeopardy by the use of a dangerous weapon, to wit, a pistol, as charged in the third count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, entered the bank described in the first count of the indictment herein, with intent to commit therein a felony, to wit, robbery, as charged in the fourth count thereof.

And said defendant being asked by the Court if he had anything to say why the sentence of the law should not be pronounced against him, and he answering nothing in bar thereof:

It is the order and sentence of the Court, that the defendant, Selvie Winfield Wells, for the said offense by him committed and charged in the first count of the indictment, be imprisoned for the period of Twenty (20) Years in a United States Penitentiary to be designated by the Attorney General of the United States; and for the said offense by him committed and charged in the second count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the second count of the indictment to begin at the expiration of that imposed under the first count thereof; and for the said offense by him committed and charged in the third count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the

third count of the indictment to begin at the expiration of that imposed under the second count thereof; and for the said offense by him committed and charged in the fourth count thereof, be imprisoned for the period of Twenty (20) Years, in a United States Penitentiary to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the fourth count of the indictment, to begin at the expiration of that imposed under the third count thereof, and that said defendant be, and he is hereby, committed to the custody of said Attorney General or his authorized representative.

It is further ordered by the Court that said defendant be temporarily held in custody by the United States Marshal for the Western District of Texas, pending definite designation of the place of confinement for service of the sentence herein imposed, a certified copy of this order to be authority to said Marshal for his action in the premises.

Ordered in open Court at San Antonio, Texas, this the 13th day of April, A.D. 1938.

/s/ ROBERT J. McMILLAN,
United States District Judge.

Approved:

W. R. SMITH, JR.,
United States Attorney,

By H. W. MOURSUND,
Assistant U. S. Attorney.

Entered: Minute Volume D-1, page .....

A true copy of the original, I certify.

MAXEY HART,
Clerk,
By J. E. DAVIS,
Deputy.

(Copied from reverse side of commitment)

This is to certify that the within named Selvie Winfield Wells has been in custody and confined in the Bexar County Jail since the 13th day of April, 1938, and is entitled to such credit.

GUY McNAMARA,
United States Marshal,
By J. D. McNIEL,
Deputy.

A true record.

By /s/ C. W. SUNDSTROM,
Record Clerk, U.S.P.,
Alcatraz, California.

Feb. 25, 1952.

United States District Court, Western District of Texas, San Antonio Division
No. 11848—Cr.

THE UNITED STATES

vs.

SELVIE WINFIELD WELLS.

MODIFIED JUDGMENT AND COMMITMENT

Whereas, on Wednesday, April 13th, A.D. 1938, the following judgment and sentence was entered in the above-styled and numbered cause, to wit:

"This day this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, Selvie Winfield Wells, in his own proper person, and thereupon the said defendant was arraigned at the bar of the court, when both parties announced ready for trial; and a jury having been waived, and the indictment having been read to the defendant, he, for himself, in open court, voluntarily entered his plea of guilty to the charges contained therein."

"Wherefore, it is considered and adjudged by the Court that the defendant, Selvie Winfield Wells, is guilty, as confessed in his said plea of guilty, of the offense of having, on or about the 5th day of March, 1938, in Caldwell County, Texas, within the Austin Division of the Western District of Texas, by putting Addie Walker in fear, feloniously taken from the presence of the said Addie Walker Two Thousand Four Hundred Eighty-two Dollars and Twenty-five Cents ($2,482.25) in money, which said money then and there belonged to the Citizens State Bank, Luling, Texas, and which said bank was then and there a banking association incorporated under the laws of the State of Texas, and was then and there an insured bank within the meaning of the provisions of Section 264, Title 12, United States Code, relating to the Federal Deposit Insurance Corporation, as charged in the first count of the indictment; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count

of the indictment herein, assaulted Addie Walker, as charged in the second count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count of the indictment herein, put the life of Addie Walker in jeopardy by the use of a dangerous weapon, to wit, a pistol, as charged in the third count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, entered the bank described in the first count of the indictment herein, with intent to commit therein a felony, to wit, robbery, as charged in the fourth count thereof."

"And said defendant being asked by the Court if he had anything to say why the sentence of the law should not be pronounced against him, and he answering nothing in bar thereof:

It is the order and sentence of the Court that the defendant, Selvie Winfield Wells, for the said offense by him committed and charged in the first count of the indictment, be imprisoned for the period of Twenty (20) Years in a United States Penitentiary to be designated by the Attorney General of the United States; and for the said offense by him committed and charged in the second count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the second count of the indictment to begin at the expiration of that imposed under the first count

thereof; and for the said offense by him committed and charged in the third count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the third count of the indictment to begin at the expiration of that imposed under the second count thereof; and for the said offense by him committed and charged in the fourth count thereof, be imprisoned for the period of Twenty (20) Years, in a United States Penitentiary to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the fourth count of the indictment, to begin at the expiration of that imposed under the third count thereof, and that said defendant be, and he is hereby, committed to the custody of said Attorney General or his authorized representative."

"It is further ordered by the Court that said defendant be temporarily held in custody by the United States Marshal for the Western District of Texas, pending definite designation of the place of confinement for service of the sentence herein imposed, a certified copy of this order to be authority to said Marshal for his action in the premises."

"Ordered in open Court at San Antonio, Texas, this the 13th day of April, A.D. 1938.

/s/ ROBERT J. McMILLAN,
United States District Judge.

Approved:

W. R. SMITH, JR.,
United States Attorney,

By H. W. MOURSUND,
Assistant U. S. Attorney."

And, Whereas, thereafter, on August 4, A.D. 1941, the defendant Selvie Winfield Wells, filed in this court his petition for correction of judgment and sentence, and on August 20, A.D. 1941, said motion for correction of judgment and sentence was denied; and

Whereas, thereafter defendant perfected his appeal from the judgment of this Court denying his motion for correction of judgment and sentence to the United States Circuit Court of Appeals for the Fifth Circuit and filed his record therein; and

Whereas, during the November term, A.D. 1941, of said United States Circuit Court of Appeals for the Fifth Circuit, to wit, on December 16, A.D. 1941, said United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the trial court entered on April 13th, A.D. 1938, as to the sentences imposed under counts one and two of the indictment herein, and affirmed the sentences imposed by the Court under counts three and four of said indictment, and on said December 16th, A.D. 1941, in its mandate, ordered and adjudged as follows, to wit:

"It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is

hereby, affirmed insofar as it upheld the sentences imposed under counts three and four, and reversed as to the sentences imposed under counts one and two; and that this cause be, and it is hereby, remanded to the said District Court for the correction of the mittimus, and for such further proceedings as are not inconsistent with the opinion of this Court."

Therefore, in accordance with the mandate of the said United States Circuit Court of Appeals for the Fifth Circuit, it is now Ordered and Adjudged by the Court that the mittimus in this cause heretofore issued on Wednesday, April 13th, A.D. 1938, be, and the same is hereby corrected as follows:

The sentences imposed herein under Counts one and two of the indictment are hereby set aside, annulled and held for naught;

and that the sentence imposed herein under Count three of the indictment be, and the same is hereby, corrected to read as follows:

"It is the order and sentence of the Court that the defendant, Selvie Winfield Wells, for the said offense by him committed and charged in the third count of the indictment, be imprisoned for the period of Twenty-five (25) years in a United States Penitentiary, to be designated by the Attorney General of the United States";

and that the sentence imposed herein under Count four of the indictment remain in full force and effect as originally imposed.

It is further ordered that the Clerk of this Court provide the Warden of the United States Penitentiary at Alcatraz, California, with a certified copy of this order for his information and observance.

Ordered in open Court at San Antonio, Texas, this 6th day of May, A.D. 1942.

/s/ W. A. KEELING,
United States District Judge.

Approved:

BEN F. FOSTER,
United States Attorney,

By J. M. BURNETT,
Assistant U. S. Attorney.

A true copy of the original, I certify.

MAXEY HART,
Clerk,

By J. E. DAVIS,
Deputy.

A True Record.

By /s/ C. W. SUNDSTROM,
Record Clerk, U. S. P.,
Alcatraz, California.

February 25, 1952.

[Endorsed]: Filed April 29, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

No. 33471

SELVIE W. WELLS,

Petitioner,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary,

Respondent.

MEMORANDUM OPINION AND ORDER

Petitioner, confined at Alcatraz Penitentiary, seeks to obtain his release. In his petition for writ of habeas corpus petitioner alleges that he has completed service of a twenty-five year sentence imposed for bank robbery by the District Court in Texas. A consecutive sentence of twenty years remains unserved. Petitioner attacks such sentence on the ground that it is void and constitutes double jeopardy.

The procedural record discloses that petitioner received an initial sentence of ninety years based on four counts arising out of violation of 12 U.S.C.A. 588(b), (a) and (b).[1] On a motion filed

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[1] "Robbery of bank; * * *

"(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or

for correction of sentence in 1941 petitioner succeeded in having the trial court, upon remand, eliminate the first two counts, with sentences totalling forty-five years. Wells vs. United States, 124 F. 2d 334.

More recently he sought relief in the District Court for the Northern District of California through a writ of habeas corpus, contending that the trial court had jurisdiction and authority to sentence him under one count only, such count including the lesser offenses described in the first

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whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both."

three counts. Honorable Louis Goodman dismissed the petition on the ground that Wells had failed to present the matter to the sentencing court as required by 28 U.S.C.A. 2255.

In accordance with the directions contained in the order made by this court, petitioner again sought relief in the trial court of Texas. He was unsuccessful in obtaining a further correction of sentence. On appeal, the Fifth Circuit sustained the trial court's ruling as the exercise of the trial court's discretion. Wells v. United States, 210 F. 2d 112.

Petitioner alleges that the additional sentence of twenty years for "entering the bank with the intention to commit a felony therein" is void and invalid, as it necessarily merged with the other sentence which has now been served, covering the offense in the aggravated form. (588(b), 12 U.S.C.A.)

The motion to dismiss filed by the respondent asserts that this Court is without jurisdiction to entertain the petition. Winhoven v. Swope, 195 F. 2d 181. It is conceded that petitioner has served twenty-five years of his sentence.

Under the law of the Ninth Circuit (Stevenson v. Johnston, 72 F. Supp. 627, affirmed 163 F. 2d 750), petitioner has completed service of the only valid sentence which the Court might impose for the act of armed robbery for which he has served his twenty-five year sentence. Cf. Holiday v. Johnston, 313 U.S. 342. The problem before this Court in-

volves the contemplation of a judgment and sentence which is void.

It is not necessary to go beyond the judgment and commitment[2] to determine that the additional

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[2]U. S. v. Wells, No. 11848, U. S. Dist. Ct., Western District of Texas, San Antonio Division; April 13, 1938.

"It is the order and sentence of the Court, that the defendant, Selvie Windfield Wells, for the said offense by him committed and charged in the first count of the indictment, be imprisoned for the period of Twenty (20) Years in a United States Penitentiary to be designated by the Attorney General of the United States; and for the said offense by him comitted and charged in the second count thereof, be imprisoned for the period of Twenty-Five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the second count of the indictment to begin at the expiration of that imposed under the first count thereof; and for the said offense by him committed and charged in the third count thereof, be imprisoned for the period of Twenty-Five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the third count of the indictment to begin at the expiration of that imposed under the second count thereof; and for the said offense by him committed and charged in the fourth count thereof, be imprisoned for the period of Twenty (20) Years, in a United States Penitentiary to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the fourth count of the indictment, to begin at the expiration of that imposed under the third count thereof, and that said defendant be, and he is hereby, committed to the custody of said Attorney General or his authorized representative."

sentence under which the petitioner is now serving at Alcatraz Penitentiary, is invalid; such fact is manifest from the record itself without the requirement of taking evidence.

Bound as I am by the law of this Circuit, the only question that now arises is whether this Court is foreclosed, under the circumstances present from declaring the sentence void and granting appropriate relief.

I cannot conceive that Section 2255, Title 28, U.S.C.A. has so far supplanted the traditional writ of habeas corpus as to preclude this Court from granting the relief prayed for, particularly when when it appears a miscarriage of justice will result.

If habeas corpus is not available to petitioner under the extreme circumstances of this case, then it is clear that procedural due process has not been, and cannot be, accorded to Wells. Procedural rigidity should not be permitted to supplant substantial justice. In Brown v. Allen, 344 U. S. 443, 512, Mr. Justice Frankfurter said, with reference to the writ of habeas corpus:

"The circumstances and conditions for bringing into action a legal remedy having such potentialities obviously cannot be defined with a particularity appropriate to legal remedies of much more limited scope. To attempt rigid rules would either give spuriously concrete form to wide-ranging purposes or betray the purposes by strangulating rigidities."

Petitioner has taken the procedural steps required by 28 U.S.C.A., Section 2255, at the behest of this Court. His petition for relief proved to be unavailing. This, despite the fact that the sentence he is

now serving and which he challenged, is void. The decision of the sentencing court is manifestly erroneous. Stevenson v. Johnston, supra. Habeas corpus is the sole remedy remaining to petitioner for establishing his right to release.

I am privileged to note herein that Honorable Louis Goodman joins with me in declaring that the sentence under which petitioner Wells is now confined in Alcatraz Penitentiary is void.

This statement is made to the end that no inferences may be drawn from the prior ruling of Judge Goodman in this case.

The petitioner may have his relief as prayed. The judgment and sentence in question is declared to be, and the same is, void and invalid.

The writ of habeas corpus may issue.

Dated: June 4, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

I Concur:

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed June 4, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

No. 33471

SELVIE W. WELLS,

Petitioner,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary,

Respondent.

WRIT OF HABEAS CORPUS

This matter having come on for hearing before the Honorable George B. Harris, Judge of the above-entitled Court, Morris M. Grupp, Esq., appearing as Counsel for petitioner above named, and Lloyd H. Burke, Esq., United States Attorney, and Richard H. Foster, Esq., Assistant United States Attorney for the Northern District of California, appearing as Counsel for the Respondent, the Court having heretofore issued its Order to Show Cause, heard the said matter on the Respondent's Motion to Dismiss said Petition, considered the arguments and statements of Counsel and fully considered the matter, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the petitioner be discharged from custody of the Respondent forthwith.

Dated this 9th day of June, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the respondent E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order, judgment and decree of the United States District Court for the Northern District of California issuing a writ of habeas corpus discharging Selvie W. Wells from the custody of respondent E. B. Swope made and entered on June 9, 1954.

Dated: June 9, 1954.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ RICHARD H. FOSTER,
Assistant U. S. Attorney,
Attorneys for Respondent.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk to the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they con-

stitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for writ of habeas corpus.

Order to show cause.

Motion to dismiss with documents attached.

Memorandum opinion and order.

Writ of habeas corpus.

Notice of appeal.

Designation of record on appeal.

Statement of points upon which appellant intends to rely.

Motion and Order for extension of time.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of August, 1954.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14,496. United States Court of Appeals for the Ninth Circuit. Edwin B. Swope, Warden, U. S. Penitentiary, Alcatraz, California, Appellant, vs. Selvie W. Wells, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 30, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit.

No. 14,496

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellant,

vs.

SELVIE W. WELLS,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, and states as the points upon which he intends to rely on appeal before the Court of Appeals for the Ninth Circuit as follows:

1. That the District Court erred in entertaining an application for a writ of habeas corpus after the denial of a motion to correct appellee's sentence by the sentencing court, the United States District Court for the Western District of Texas, under Section 2255 of Title 28 United States Code, and the decision of the Court of Appeals for the Fifth Circuit affirming that denial in Wells v. United States, 210 F. 2d 112.

2. That the District Court erred in holding that appellee's sentence of twenty years for "entering a bank with intent to commit a felony therein," merged with appellee's twenty-five year sentence for bank robbery.

Dated: September 2, 1954.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ RICHARD H. FOSTER,
Assistant U. S. Attorney,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 2, 1954.

No. 14,496

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWIN B. SWOPE, Warden United States Penitentiary, Alcatraz, California,
Appellant,

vs.

SELVIE W. WELLS,
Appellee.

BRIEF FOR THE UNITED STATES.

LLOYD H. BURKE,
United States Attorney.
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
San Francisco 1, California,
Attorneys for Appellant.

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No. 14,496

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWIN B. SWOPE, Warden United States Penitentiary, Alcatraz, California,

Appellant,

vs.

SELVIE W. WELLS,

Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

This Court has jurisdiction of this appeal under the provisions of Sections 2253 and 2255 of Title 28, United States Code.

STATEMENT OF THE CASE.

On April 7, 1954 Selvie W. Wells petitioned for a Writ of Habeas Corpus (R. 3-6). On April 8, 1954 United States District Judge George B. Harris of the United States District Court for the Northern District of California issued an Order directing Edwin B.

Swope, Warden of the United States Penitentiary at Alcatraz Island, State of California, to show cause, if any, why a Writ of Habeas Corpus should not issue (R. 7). On April 29, 1954 Appellee, through his attorney, moved to dismiss the Petition for Writ of Habeas Corpus (R. 8-20). On June 4, 1954 Judge Harris in a Memorandum Opinion and Order concurred in by United States District Judge Louis E. Goodman ordered that a Writ of Habeas Corpus issue (R. 20-25). This as an appeal from the Writ of Habeas Corpus discharging Selvie W. Wells from the custody of Edwin B. Swope, Warden of the United States Penitentiary at Alcatraz, California, filed on June 9, 1954 by George B. Harris, United States District Judge for the Northern District of California (R. 26).

FACTS.

Appellee, after a plea of Guilty, was on March 5, 1938 in the Western District of Texas, sentenced to 20 years on the First Count of the Indictment, 25 years on the Second Count of the Indictment, to be consecutive to the First Count, 25 years on the Third Count of the Indictment, to be consecutive to the Second Count, and 20 years on the Fourth Count, to be consecutive to the Third Count (R. 9-12).

The First Count of the Indictment charged Appellee with taking money of an insured bank on March 5, 1938 by putting a certain Addie Walker in fear (R. 10). The Second Count of the Indictment charged

Appellee, at the time and place described in the First Count of the Indictment, with assaulting the said Addie Walker. The Third Count of the Indictment charged Appellee, at the time and place described in the First Count of the Indictment, with putting the life of the said Addie Walker in jeopardy by the use of a dangerous weapon (R. 10-11). The Fourth Count of the Indictment charged Appellee, at the time and place described in the First Count of the Indictment, with entering a bank with intent to commit a robbery (R. 11). On August 4, 1941 Appellee petitioned for correction of Judgment and Sentence to the United States District Court for the Western District of Texas (R. 17). On August 20, 1941 this motion was denied (R. 17). After appeal was taken from the denial of the motion, the Court of Appeals for the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the Trial Court entered on April 13, 1938 (R. 17). The Court of Appeals ordered that Counts One and Two of the 1938 judgment be set aside (R. 18), but that Counts Three and Four remain in full force and effect.

Appellee then moved the United States District Court for the Northern District of California for a Writ of Habeas Corpus (R. 21). United States District Judge Louis E. Goodman dismissed this Petition on the grounds that Wells had failed to present the matter to the sentencing Court, as required by 28 U.S.C. 2255 (R. 22). The Petitioner then moved the United States District Court for the Western District of Texas for modification under that section.

The United States District Court denied this motion (R. 22). The Court of Appeals for the Fifth Circuit in the case of *Wells v. United States* reported at 210 F.2d 112, sustained the Trial Court (R. 22). It does not appear that Petitioner sought certiorari to the Supreme Court from this decision.

Petitioner then moved the United States District Court for the Northern District of California for a Writ of Habeas Corpus (R. 3-6).

Judge Harris granted a Writ of Habeas Corpus and in his Memorandum Opinion stated:

> "Petitioner has taken the procedural steps required by 28 U.S.C., Section 2255 at the behest of this Court. His petition for relief proved to be unavailing. This, despite the fact that the sentence he is now serving and which he challenged, is void. The decision of the sentencing court is manifestly erroneous. Stevenson v. Johnston, supra. Habeas corpus is the sole remedy remaining to petitioner for establishing his right to release."
>
> (R. 24-25.)

Appeal is taken to this Court from the Order, Judgment and Decree issuing a Writ of Habeas Corpus of Judge Harris.

QUESTIONS.

1. Did the District Court have jurisdiction to issue a Writ of Habeas Corpus after a Motion under Section 2255 of Title 28 U.S.C.A. was denied by the sentencing Court?

2. Can there be consecutive sentences for "entering a bank with intent to commit bank robbery and putting in jeopardy the life of a person by the use of a dangerous weapon?

ARGUMENT.

The District Court had no jurisdiction.

Section 2255 provides in part as follows:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the Court which sentenced him, or that such Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

In this case appellee applied for relief under Section 2255 and this relief was denied by the Court which sentenced him (R. 22). This decision was appealed to the Court of Appeals for the Fifth Circuit. That Court of Appeals in an Opinion reported at 210 F.2d 112, sustained the decision of the sentencing Court (R. 22).

Wells did not seek certiorari. The Court of Appeals for the Fifth Circuit stated at page 112 that "The appellant raises the question as to whether the sentence on Count Four is void for the reason that it constitutes a conviction for the same offense as described in Count Three." The Court of Appeals for the Fifth

Circuit also observed that the Motion before them was the fourth motion filed by appellee to vacate the judgment and sentence. The Court further observed that in *Wells v. United States,* 124 F.2d 334 the Court had upheld the sentence imposed on the Fourth Count as a "separate and distinct offense."

In *Hayman v. Swope,* 342 U.S. 205 at pp. 212-219, the Supreme Court reviewed the legislative and judicial history of Section 2255 of Title 28 U.S.C.A. The Supreme Court referred particularly to the problems created by repetitious petitions for habeas corpus. The Court observed that in 1943, 1944 and 1945, 40 percent of the petitions for habeas corpus were so-called "repeaters." Since Alcatraz Penitentiary is in the Northern District of California, the Court of Appeals for the Ninth Circuit has had considerable experience with the habeas corpus problem. Clearly, one of the reasons for the enactment of Section 2255 was to minimize the waste of judicial time caused by the relitigation of cases which have heretofore received exhaustive judicial attention.

This Court of Appeals has decided the question whether a Federal prisoner may seek a writ of habeas corpus after an application for Section 2255 relief has been denied on the merits. In *D. E. Normand v. Swope* (9th Cir.) 207 F.2d 66, *Jones v. Squire* (9th Cir.) 195 F.2d 179, *Winhoven v. Swope* (9th Cir.) 195 F.2d 181, this Court has held that where relief is denied on a Section 2255 Motion, a District Court is without jurisdiction to entertain a Federal prisoner's

application for a writ of habeas corpus. The Court of Appeals for the Tenth Circuit has also held that one may not resort to habeas corpus after exhausting his remedies under Section 2255.

Whiting v. Hunter, 204 F.2d 471;
Mills v. Hunter, 204 F.2d 468;
Barrett v. Hunter, 180 F.2d 510, 20 A.L.R. 2d 965.

Judge Harris apparently has concluded that if in the circumstances of this case habeas corpus is not available then Wells has been deprived of procedural due process of law. Judge Harris comes to this conclusion because, in his opinion, "The decision of the sentencing court is manifestly erroneous." (R. 25).

The Court of Appeals for the Tenth Circuit in *Barrett v. Hunter,* 180 F.2d 510 concluded that there was no constitutional problem in the finality of a Sec. 2255 motion. This Court in the decisions above cited holds that Congress has deprived the District Court of jurisdiction. In brief, Judge Harris is granted a writ of habeas corpus because he disagreed with the decision of the Court of Appeals for the Fifth Circuit. We submit that a disagreement with a Circuit Court's Opinion does not create "extreme circumstances". Furthermore, the denial by one Court of a Motion under Section 2255 does not make that remedy inadequate or ineffective. Such a result would by-pass the intention of Congress to make the Motion to Vacate conclusive except in those exceptional cases where the remedy is inadequate or ineffective. *Barrett v. Hunter,* supra.

If the opportunity to recontest the issues litigated under a Motion to Vacate is given every time there is a possibility for disagreement between the place of confinement and the place of conviction, the purpose of Section 2255 will be defeated. The reasonable solution to the very serious problem of repetitious petitions for habeas corpus will be subverted. The supposedly final determination of Section 2255 will be merely another stopping place on the judicial merry-go-round.

We respectfully submit that under the statute and under the decisions of the Court of Appeals for the Ninth Circuit and other Courts of the Federal Judicial System, the District Court was without jurisdiction to entertain the writ of habeas corpus.

A CONVICTION OF AGGRAVATED BANK ROBBERY DOES NOT MERGE WITH A CONVICTION OF ENTERING THE SAME BANK WITH INTENT TO COMMIT BANK ROBBERY.

Appellee was convicted in the Third Count of the Indictment of the "offense of having . . . committed the offense described in the First Count of the Indictment . . . (and) put the life of Addie Walker in jeopardy by the use of a dangerous weapon, to-wit, a pistol, . . ." (R. 10-11). The First Count of the Indictment charged Wells with robbing the Citizens State Bank, Luling, Texas, on March 5, 1938 (R. 10). Wells was convicted on the Fourth Count of the Indictment of the "offense of having, . . . entered the bank described in the First Count of the Indictment,

. . . with the intent to commit therein a felony, to-wit, robbery, . . .'' (R. 11).

Wells was actually convicted of the aggravated robbery of a bank in the Third Count of the Indictment. In the Fourth Count he was convicted of entering a bank with intent to commit a felony. Count Three charges a violation of the first paragraph of Section 2113(a) and Section 2113(d) of Title 18.[1] The Fourth Count of the Indictment charges a violation of the second paragraph of Section 2113(a).[2] It was Judge Harris's opinion that the conviction on Count Four necessarily merged with the conviction of aggravated bank robbery in Count Three.

It should be noted that Count Three does not charge putting in jeopardy the life of a person while *entering a bank with intent to commit a felony.* It charges putting in jeopardy the life of a person *while robbing a bank.* Count Three charges an aggravated form of the first paragraph of Section 2113(a). Count Four,

---

[1](a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

[2]Whoever enters or attempts to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony affecting such bank and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

however, charges a violation of the second paragraph of Section 2113(a). A conviction of Section 2113(a) and a conviction of 2113(d) will merge if the Section 2113(d) conviction is the aggravated form of the former. However, the aggravated offense charged in Count Three is not that of *entering a bank,* but is that of the charge of *robbing a bank.* A conviction of the violation of the first and second paragraphs of Section 2113(a) does not merge because they are different offenses.

Rawls v. U. S., 162 F.2d 798;
Audett v. U. S., 132 F.2d 528.

In the *Rawls* case the Court of Appeals for the Tenth Circuit said: "The test to be applied to determine whether there are two offenses is whether each requires proof of a fact that the other does not." In a situation where the entry of a bank with intent to commit a felony and the robbing of a bank arose out of the same transaction, the Court held that the evidence necessary to prove an illegal entry was different from that for taking and carrying away property and therefore the two crimes did not merge, so as to preclude consecutive sentences. The Court of Appeals for the Fifth Circuit has held in the case of *Wells v. U. S.,* 124 F.2d 334, which involved the very same defendant as here; concerning the very same facts, that the conviction for *entering* a bank with intent to rob and for aggravated *bank robbery* did not merge. A conviction of Section 2113(e) does not merge with a conviction of aggravated bank robbery. *Clark v. U. S.,* 184 F.2d 952. See also *Ward v. U. S.,* 183 F.2d 270.

The mere fact that a conviction of two crimes arises out of the same transaction does not necessarily mean that the convictions merge. This Court held in *Crapo v. Johnston* (9 Cir.) 144 F.2d 863 that a conviction for possession of an unregistered firearm did not merge with the interstate transportation of that firearm. In *Arzaga v. U. S.* (9 Cir.) 189 F.2d 256 the Court held that a conviction for concealment of opium did not merge with a conviction of importation of that same opium. Neither does the crime of stealing mail bags merge with the crime of taking mail from those same bags. *Hoffenbarger v. Alderhold,* 67 F.2d 250. Nor does keeping an altered security with intent to pay the same, and passing that same security. *McMurty v. U. S.,* 139 F.2d 482. Obstructing justice is a separate crime from bribing a juror, even though the obstruction of justice was by the bribing of that same juror. *Slade v. U. S.,* 85 F.2d 686. The Supreme Court in *Morgan v. Devine,* 237 U.S. 632 held that burglarously entering with intent to steal does not merge with the crime of stealing stamps once the entry is made. In *Albrecht v. U. S.,* 273 U.S. 1, the Court held that a conviction of selling contraband liquor did not merge with a conviction of possessing that liquor for the reason that one may sell liquor without passing the same.

In *Blockburger v. U. S.,* 284 U.S. 299, in a case where the contention was made that the selling of narcotics out of the original stamped package merged with the selling of those narcotics without a written order, the Court gave as the test of whether or not there are two offenses in a single transaction as

whether or not each requires proof of an additional fact which the other does not.

> "The applicable rule is that here the same account or transaction constituted a violation of two distinct statutory provisions, the test to be applied to determine whether there were two offenses or only one is whether each provision requires proof of a fact which the other does not."
>
> *Blockburger v. U. S.,* supra.

Applying this test to the case at bar, the question is whether or not a person could rob a bank without entering it, and conversely, whether a person could enter a bank with intent to commit a felony and not rob it. It is obvious that entering a bank with intent to commit a felony need not result in the robbery of that bank.

Whether or not a person could rob a bank without entering it is a question presenting somewhat more difficulty. However, it is clear that a person could rob a bank by standing outside the door and threatening the employees inside. He would not have entered and yet would have robbed. A person could threaten the employees of a bank by mail or by telephone at a place far removed from the bank property itself, and still rob. Another situation might be where the robber realizes his intent to rob after his entry. In other words, he does not make up his mind until after he is in the building to take or carry away the funds of a bank.

The fact which is required to be proved in the crime of entering a bank with intent to commit a felony, which the crime of aggravated bank robbery does not,

is entry. The fact which the crime of "aggravated bank robbery" requires, which the crime of "entering a bank with intent to commit a felony" does not, is robbery. Congress by listing these two crimes in separate paragraphs of Section 2113(a) evidenced an intent that these two acts which may or may not form part of the same transaction be punishable separately.

In the present case Judge Harris was obviously moved by the somewhat harsh sentence of the Texas Court. The assessing of consecutive 25 and 20-year sentences for a single transaction is somewhat severe. The choice of the punishment to be applied in this case, however, was that of the Court which tried the case.

The case of *Stevenson v. Johnson,* 72 F. Supp. 627, affirmed 163 F.2d 750, involved a situation where the defendant was convicted of robbing a bank and received also a consecutive sentence for "robbing a bank and putting in fear the life of a person." This case is readily distinguishable from the instant case in that the two crimes present here are entry of a bank with intent to commit a felony and aggravated bank robbery. In *Stevenson v. Johnson,* supra, one charge was merely the aggravated form of the other. That is to say, the aggravated form of the first paragraph of Section 2113(a), the case did not involve the first and second paragraphs of Section 2113(b).

It would be, of course, possible to charge in violation of Section 2113(d) the aggravated form of a violation of the second paragraph of Section 2113(a). However, this is not true here.

CONCLUSION.

Appellant respectfully submits that the District Court erred in deciding that entering a bank with intent to commit a felony and putting a person's life in jeopardy while robbing a bank was the same offense. Appellant further submits that even if the Court clearly interpreted the decisions of the Ninth Circuit in this regard, it had no jurisdiction in the instant case. Wells failed to appeal from the decision of the Court of Appeals for the Fifth Circuit in the proceeding, which under Section 2255 of Title 28 was the proper place to determine the validity of his sentence. Under the plain language of that statute and the decisions of this Court of Appeals and other Courts which have had the question, the District Court had no jurisdiction. The decision of the District Court discharging Wells from custody should be reversed and Wells ordered returned to the custody of the appellant.

Dated, San Francisco, California,
November 12, 1954.

Respectfully submitted,

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Attorneys for Appellant.

No. 14,496

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWIN B. SWOPE, Warden United States Penitentiary, Alcatraz, California,
Appellant,

vs.

SELVIE W. WELLS,
Appellee.

APPELLEE'S REPLY BRIEF.

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IN THE

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SELVIE W. WELLS,
Appellee.

APPELLEE'S REPLY BRIEF.

THE FACTS.

The facts as set forth by the appellant are correct.

THE QUESTIONS.

The appellant presents two questions, the answers to which are determinative of the issues involved in this appeal:

"1. Did the District Court have jurisdiction to issue a Writ of Habeas Corpus after a Motion under Section 2255 of Title 28, U.S.C.A., was denied by the sentencing Court?

2. Can there be consecutive sentences for 'entering a bank with intent to commit bank robbery and putting in jeopardy the life of a person by the use of a dangerous weapon'?"

ARGUMENT.

THE FIRST QUESTION PRESENTED BY APPELLANT.

As to the first question, appellee urges that in the instant case the District Court properly issued the writ of habeas corpus.

An examination of the background of Section 2255, Title 28, U.S.C.A., discloses that it was originally offered as both a procedural and a jurisdictional measure before Congress. It was adopted in its present form after long discussions, and after members of the judiciary took part in presenting it to Congress. It was suggested that its adoption would alleviate some of the back-log of habeas corpus proceedings in those districts in which federal prisoners were incarcerated.

It is to be noted that if the purpose of Section 2255 is procedural, it merely provides another or cumulative method to the habeas corpus proceedings. This must be so because the right to the remedy of habeas corpus is guaranteed by the Constitution of the United States, Article I, Section 9, Paragraph 2.

It cannot therefore be successfully contended that a procedural statute can overrule the plain mandate of the Constitution of the United States.

Secondly, if Section 2255 is to be interpreted as a sole remedy, then we are still confronted with the plain mandate of the Constitution, which provides that the right of habeas corpus "shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it;" (Art. I, Sec. 9, Para. 2, Constitution); therefore, the Act of Congress in affording jurisdiction can only mean that Section 2255 is to provide an alternate method for determining certain questions.

Appellee agrees that the District Court was correct in stating that one must follow the procedure outlined in Section 2255, but maintains that thereafter he has a right to petition for habeas corpus in the district where he is incarcerated, where he is serving a void sentence.

There are serious doubts as to the constitutionality of Section 2255, if it is to be interpreted as an exclusive remedy. In *Hayman v. United States*, 187 Fed. (2d) 456, this Court held that section unconstitutional. Although certiorari was granted and this case was subsequently decided by the Supreme Court in *United States v. Hayman,* 72 S.Ct. 263, (and although this latter citation is often used as sustaining the constitutionality of Section 2255), the Supreme Court *did not* decide the constitutionality thereof. At page 274 of 72 S.Ct., after pointing out that the District Court erred in determining factual issues, "under such circumstances, we do not reach constitutional questions", the Court pointed out further that even where a constitutional question is

properly presented, it will not pass upon it unless such adjudication is unavoidable.

We are unable to find any other United States Supreme Court decision determining the constitutionality of Section 2255.

It would therefore appear that in this district, the decision of this Court as to the constitutionality of Section 2255 is still controlling.

In the case of *Barrett v. Hunter,* 180 Fed. (2d) 510 and 20 A.L.R. (2d) 965, (where this question is annotated), the Court, discussing Section 2255, stated:

> "Section 2255 does not in our opinion apply to applications for a writ predicated on fact arising after the imposition of sentence, such as, for example, where the sentence has been fully served, and the prisoner is unlawfully thereafter detained in custody."

The facts of the instant case bring it squarely within the above quotation.

The case of *Martin v. Hiatt,* 174 Fed. (2d) 350, decides that Section 2255 is an additional remedy, but does not discuss the question of whether or not a petition for habeas corpus can be used after following the procedure there set forth. In that case, although there was no prior application under Section 2255, it seems to be good law for the statement that habeas corpus is an additional remedy to Section 2255 and that Section 2255 does not eliminate the right of habeas corpus.

There is another and more serious objection to the conclusion that Section 2255 supersedes that right to habeas corpus, under the facts of this particular case. Under habeas corpus, any finding of fact on a particular point is not *res judicata* as to the facts determined in a particular petition for a writ of habeas corpus. Under Section 2255, any decision on issues raised is *res judicata.* In fact, the judgment in the proceeding under Section 2255, being *res judicata,* is therefore strictly antagonistic towards a judgment rendered on a petition for writ of habeas corpus, which does not become *res judicata.*

In this particular case, the remedy under Section 2255, being availed of by the prisoner without any effect, is therefore incomplete and inadequate to further determine the legality of his detention. If he is illegally detained then it must follow that he should have the right to proceed by way of a writ of habeas corpus.

Habeas corpus has been one of the priceless privileges under our form of government, guaranteed by our Constitution. It is and has been the major method used to protect persons from unconscionable acts by those holding public office. It has been, and we trust will remain, one of the cornerstones of our freedom.

To contend that the right of habeas corpus can be so eliminated by a law adopted by Congress is to contend that the Constitution can be amended or superseded by any Act of Congress.

Appellee therefore concludes:

1. That 2255 is merely a cumulative or additional remedy to habeas corpus, in instances where one is serving under a void sentence, and that before a petition for a writ of habeas corpus can be filed, the petitioner must show that he has first availed himself of his rights under Section 2255. After that has been done, then petitioner is entitled to the use of the petition for writ of habeas corpus.

2. A serious question of the constitutionality of Section 2255 is raised by the contention that an Act of Congress overrides the plain import of the language of the Constitution, by placing insurmountable road-blocks in the way of any person attempting to avail himself of his just right to question the legality of his incarceration.

3. The prisoner has done everything required of him under Section 2255 and now has the right to proceed by reason of habeas corpus, even though Section 2255 is thought to be constitutional.

THE SECOND QUESTION PRESENTED BY APPELLANT.

As to the second question presented by appellant, it now seems well settled that the single act of entering and robbing a bank does not constitute more than one crime. The case of *Lockhart v. United States,* 136 Fed. (2d) 122, at page 124, held:

> "Although the indictment contained three counts, statute upon which it was based creates only one crime. This concession made by the

> government in *Holliday v. Johnston,* supra, 313 U.S. Page 349, 61 S. Ct. 1017, 85 L. Ed. 1392, is adhered to here and is supported by *Durrett v. United States,* (5th Cir.) 107 Fed. (2nd) 438 at 439; *Wells v. United States* (5th Cir.) 124 Fed. (2nd) 334; *Hewitt v. United States* (8th Cir.), 110 Fed. (2nd) 1 at Page 10; and *Dimenza v. Johnston* (9th Cir.), 130 Fed. (2nd), 465 at 466. As epitomized in the Dimenza case, 'These Courts held that the offense of bank robbery by the use of deadly weapons as defined in Section 588B (b) is the same offense described in Section 588B (a), aggravated by use of a deadly weapon, and that Congress did not intend to define two separate offenses but only one, either aggravated or not.' "

To the same effect, and using almost identical language, the 9th Circuit, in *Coy v. Johnston,* 136 Fed. (2d) 818 at 819, held that the offense of robbery by use of a deadly weapon as defined in Section 588B(b) is the same offense as that described in Section 588B(a).

The instant case comes squarely within the provisions of *Holbrook v. United States,* 136 Fed. (2d) 649, where the Court under a similar situation refused to set aside a 20 year sentence upon the serving of a 5 year sentence because that was the shorter sentence. In the instant case the 25 year sentence, which is the longer of the two sentences, has already been served, and no legal reason exists to compel the execution of the 20 year sentence on the fourth count.

Hewitt v. United States, 110 Fed. (2d) 1, cites *Durrett v. United States,* 107 Fed. (2d) 438, to the

effect that the statute in question creates but one offense and only one sentence may be imposed thereunder; it also cites *Casebeer v. United States,* 87 Fed. (2d) 668, in support of the conclusion that an indictment which charges the offense under Section 588C of Title 12, U.S.C.A. (Bank Robbery Accompanied by Kidnapping) covered the offenses defined in Section 588B.

Simunov v. United States, 162 Fed. (2d) 314 (6th Cir.) was on an indictment in four counts charging appellant with entering a bank with intent to commit a felony, stealing, putting a life in jeopardy by the use of a dangerous weapon, and attempting to avoid apprehension by forcing a bank officer to accompany him without the consent of such officer. At page 315 the Court said:

> "It is now settled that the statute dealing with the offense of bank robbery creates but a single offense with various degrees of aggravation permitting sentences of increased severity."

A blanket sentence of 65 years was reduced to 25 years.

Dimenza v. Johnston, 130 Fed. (2d) 465 (9th Cir.), was on an indictment of four counts for bank robbery by force and violence, putting in fear with use of a deadly weapon, jeopardizing the lives of three separate persons, and also charged a conspiracy to commit bank robbery. This Court reviewed the question here involved, pointing out that the test in determining whether more than one offense is charged in an

indictment or denounced by statute is whether or not each supposed offense requires proof of some fact which the others do not. This Court pointed out that Section 588B(a) describes the offense of bank robbery by taking from the person or presence of another by force or violence or by putting in fear, whereas Section 588B(b) deals with the commission or attempt to commit the foregoing offense by assaulting or putting in jeopardy the life of any person by the use of a dangerous weapon or device.

Citing various cases referred to in this brief, this Court pointed out that the offense of bank robbery by the use of deadly weapons as defined in Subsections (a) and (b) of Section 588B is the same offense and that Congress did not intend to define two separate offenses but only one, either aggravated or not.

This Court held to the same effect in *McDonald v. Johnston,* 149 Fed. (2d) 768.

Thus we must conclude that the alleged offense in the Fourth Count, to wit, the entering of the bank with the intent to commit robbery, cannot be deemed other than the same offense which was consummated. It could apply to no other offense, as was clearly set forth in *Jerome v. United States,* 318 U.S. 101, 63 S. Ct. 483, and *Darnett v. Hunter,* 138 Fed. (2d) 448.

The decision of the Court of Appeals for the 5th Circuit in the instant case is clearly erroneous under its own decisions.

In *O'Keefe v. United States,* 158 Fed. (2d) 591 (5th Cir.), the defendant pled guilty to two counts,

to wit, the taking of the money by force and violence and by putting in fear the cashier of a named bank. The Court held it was *one* offense and only *one* sentence could be imposed.

In *Gant v. United States,* 161 Fed. (2d) 793 (5th Cir.), a defendant was charged in four counts. The fourth count charged an assault against a customer of the bank, an entirely different person than the party who allegedly was assaulted in the third count. At page 795 the Court held:

> "The United States admits that a count drawn under Subsection (a) and a count drawn under Subsection (b) covering the same robbery can constitute but one offense, and that in this case Counts Three and Four merely charge the commission, in aggravated form, of the same offense laid in Counts One and Two."

The Court then points out at page 795, that decisions rendered since the imposition of the original sentence in that case make it clear:

> "and, in fact, it is conceded, that only one offense was chargeable under the two subsections (a) and (b)."

At page 796 the Court states:

> "The greater includes the lesser. A defendant charged with murder may be convicted of manslaughter, and in like manner, a defendant charged with bank robbery under Section 588B (b) may under the same indictment be convicted of a charge of bank robbery under Section 588B(a)."

At page 796 the Circuit Court for the 5th Circuit discusses its own decision in the case of *Wells v. United States,* 124 Fed. (2d) 334 (5th Cir.), wherein it states:

> "We upheld the larger sentence imposed under Counts Three and Four and remanded the case to the lower court to make a correction by vacating the sentence under Counts One and Two."

It is significant that the Court uses the word "sentence" in the *singular,* rather than "sentences" in the plural, and it raises a decided question as to just what was meant by the Court in the decision of *Wells v. United States,* supra.

Notwithstanding that earlier the 5th Circuit decided the case of *Durrett v. United States,* 107 Fed. (2d) 438, the Court in the case of *Wells v. United States* started its decision *with an erroneous premise* by stating at page 335:

> "Section 588B (a), supra, creates four separate and distinct crimes. Two of these, robbery of a bank by force and violence and putting in fear, and entering of a bank with intent to commit a felony therein, were charged by Counts One and Four, respectively. Section 588B (b) creates no separate offense, but it provides for increased punishment if the crimes named in Subsection (a) are committed under aggravated circumstances. For *each* offense committed under Subsection (a), the statute contemplates but one sentence, the severity thereof depending upon the manner of its perpetration." (Italics ours.)

In support of this later statement, the Court cites the cases of *Holliday v. Johnston,* supra, and *Durrett v. United States,* supra, and *Hewitt v. United States,* supra. We do not believe these cases support the full above quoted statement of the 5th Circuit Court. Those cases distinctly hold that Section 588B (a) *does not* create four separate and distinct crimes but only one offense. The Court thereafter went forward on the mistaken premise that the entry of a bank with intent to commit a felony therein, which was the same entry under which the felony itself was committed, to wit, the robbery of the bank, constituted a separate and distinct crime.

CONCLUSION.

Because, therefore, appellee has fully completed serving the sentence which could legally be imposed; because Section 2255 was not intended as a remedy in derogation of a writ of habeas corpus in instances where, without question, a miscarriage of justice will result; because a void sentence has at all times been subject to attack by habeas corpus; because the four counts under which appellee was convicted constitute but one single offense and are subject to but one sentence; and finally, because, as the Honorable George D. Harris, Judge of the United States District Court, put it in his memorandum opinion filed in this case, which was concurred in by the Honorable Louis E. Goodman:

> "If habeas corpus is not available to the petitioner under the extreme circumstances of this case, then it is clear that procedural due process has not been and cannot be accorded to Wells. Procedural rigidity should not be permitted to supplant substantial justice." (R. 24.)

It is respectfully submitted that the decision and judgment of the District Court be affirmed.

Dated, San Francisco, California,
December 29, 1954.

Respectfully submitted,

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No. 14,496

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California,
Appellant,

vs.

SELVIE W. WELLS,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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SELVIE W. WELLS,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

STATEMENT OF THE CASE.

On April 7, 1954 Selvie W. Wells petitioned for a Writ of Habeas Corpus. On April 8, 1954, United States District Judge George B. Harris of the United States District Court for the Northern District of California issued an order directing Edwin B. Swope, Warden of the United States Penitentiary at Alcatraz Island, State of California, to show cause, if any, why a Writ of Habeas Corpus should not issue. On April 29, 1954, appellee, through his attorney,

moved to dismiss the petition for Writ of Habeas Corpus. On June 4, 1954 Judge Harris in a memorandum opinion and order concurred in by United States District Judge Louis E. Goodman ordered that a Writ of Habeas Corpus issue. An appeal was taken from the decision of George B. Harris, United States District Judge for the Northern District of California, allowing the writ to issue.

On July 18, 1955, the United States Court of Appeals for the Ninth Circuit entered its judgment reversing the decision of the District Court.

THE FACTS.

Appellee, after a plea of guilty, was on March 5, 1938 in the Western District of Texas, sentenced to 20 years on the first count of the indictment, 25 years on the second count of the indictment, to be consecutive to the first count, 25 years on the third count of the indictment, to be consecutive to the second count, and 20 years on the fourth count, to be consecutive to the third count.

The first count of the indictment charged appellee with taking money of an insured bank on March 5, 1938 by putting a certain Addie Walker in fear. The second count of the indictment charged appellee, at the time and place described in the first count of the indictment, with assaulting the said Addie Walker. The third count of the indictment charged appellee, at the time and place described in the first count of the indictment, with putting the life of the

said Addie Walker in jeopardy by the use of a dangerous weapon. The fourth count of the indictment charged appellee, at the time and place described in the first count of the indictment, with entering a bank with intent to commit a robbery. On August 4, 1941 appellee petitioned for correction of judgment and sentence to the United States District Court for the Western District of Texas. On August 20, 1941 this motion was denied. After appeal was taken from the denial of the motion, the Court of Appeals for the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the trial Court entered on April 13, 1938. The Court of Appeals ordered that counts one and two of the 1938 judgment be set aside, but that counts three and four remain in full force and effect.

Appellee then moved the United States District Court for the Northern District of California for a Writ of Habeas Corpus. United States District Judge Louis E. Goodman dismissed this petition on the grounds that Wells had failed to present the matter to the sentencing Court, as required by 28 U.S.C.A. 2255. The petitioner then moved the United States District Court for the Western District of Texas for modification under that section. The United States District Court denied this motion. The Court of Appeals for the Fifth Circuit in the case of *Wells v. United States* reported at 210 Fed. (2d) 112, sustained the trial Court.

Petitioner then moved the United States District Court for the Northern District of California for a

Writ of Habeas Corpus, which was granted, and thereafter the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court in granting said petition.

QUESTION.

Appellee presents one question, which we feel was inadvertently overlooked by the honorable judges of the United States Court of Appeals in their opinion reversing the District Court:

That Section 2255 of Title 28, U.S.C.A. is a procedural prerequisite to obtaining and filing a petition for Writ of Habeas Corpus, only and not an exclusive remedy.

ARGUMENT.

Section 2255, Title 28, U.S.C.A. is supposed to set forth remedies that are available on motion attacking a sentence. It is important to note in that regard that the first paragraph of said code section provides that the prisoner in custody "may move the Court which imposed the sentence". In this respect, it is important to note that the use of the word "may" is directory only and not mandatory. Using the term "may" can only indicate that this is an alternate approach to the rights allowed by habeas corpus, or at least a prerequisite to instituting habeas corpus proceedings in the jurisdiction wherein the petitioner is incarcerated.

Further, the third paragraph of said code section sets forth the fact that the Court shall "determine the issues and make findings of fact and conclusions of law with respect thereto." This can only mean that the findings of fact and conclusions of law are necessary to enable another Court to determine if a Writ of Habeas Corpus should issue, and providing a quick, efficient method of ascertaining certain questions of facts.

Michener v. U. S., 177 Fed. (2d) 422.

In this manner and examined from this aspect, 2255 provides a prerequisite to filing a petition for a Writ of Habeas Corpus. It has been determined and indirectly set out by many Courts and assumed by them in the course of determining the factual issues before them and the law that Section 2255 provides only a procedural prerequisite to being able to file a petition for a Writ of Habeas Corpus.

Wong v. Vogel, D.C., 80 F. Supp. 723;
Stidham v. Swope, D.C., 82 F. Supp. 931;
United States v. Calp, D.C., 83 F. Supp. 152;
St. Clair v. Hiatt, D.C., 83 F. Supp. 585;
Burchfield v. Hiatt, D.C., 86 F. Supp. 18;
Fugate v. Hiatt, D.C., 86 F. Supp. 22;
Parker v. Hiatt, D.C., 86 F. Supp. 27;
Mugavero v. Swope, D.C., 86 F. Supp. 45;
Taylor v. United States, 4 Cir., 177 F. (2d) 194;
Birtch v. United States, 4 Cir., 173 F. (2d) 316;
Howell v. United States, 4 Cir., 172 F. (2d) 213;

United States v. Meyers, D.C., 84 F. Supp. 766;
United States v. Lowery, D.C., 84 F. Supp. 804.

This view is further borne out by the case of *Stidham v. Swope,* 82 Fed. Supp. 931, wherein C. J. Denman said:

> "Petitioner now seeks to file an amended petition purporting to set forth that he has complied with the provisions of 28 U.S.C.A. Section 2255. This section provides a complicated and time consuming condition precedent to the filing of a petition for a writ of habeas corpus. It requires a motion to the sentencing court upon which are to be litigated the issues which may be later presented to the judge or court by the petition for the writ. Either party may appeal from the decision on the motion.
>
> This procedure by motion does not purport to be a substitute for the writ, since the party is not required to be produced before the sentencing court, and he can be transported and appear there as party and as witness only by the exercise of the judicial discretion of that court.
>
> The last sentence of section 2255 provides that the court or judge receiving a petition for the writ need not require the performance of such a condition precedent to its entertainment if 'it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'
>
> Here the petitioner is in Alcatraz Penitentiary upwards of 1,500 miles from the sentencing court. If petitioner be taken there, it will be with two guards from whom time consuming arrangements must be made. When they are provided there

must be railroad reservations. It well could be two weeks before petitioner is in jail in Missouri. There must be found an attorney who must study the law and facts and prepare petitioner's motion, then a hearing with the petitioner and other witnesses appearing. If the decision be favorable to the petitioner, the United States, the adverse party in the sentencing court, in its appeal as in a habeas corpus proceeding may consume months of time, many months if the appellate court be in vacation.

If the petitioner be not taken to Missouri, the sentencing court there must appoint an attorney to represent him. That attorney in Missouri must correspond with his client in California to learn the facts and study the law in his case before preparing his motion. The motion, when prepared probably several weeks later, will be filed. Then the motion must be served upon the United States attorney, when the trial and likely appeal will follow.

If the decision be adverse in the Missouri proceeding and the petitioner be found wrongly imprisoned when the habeas corpus proceeding is decided, every day of the long delay before the latter petition may be presented to me is wrongfully taken out of his free life.

It is my opinion that the habeas corpus proceeding recognized by Article I, Section 9 of the Constitution does not permit such continued imprisonment prior to the entertainment of a petition seeking the writ. The constitutional writ of habeas corpus is that of England as it was in 1789. *United States v. Wong Kim Ark,* 169 U. S. 649, 655, 18 S. Ct. 456, 42 L. Ed. 890; *Ex*

parte Grossman, 267 U. S. 87, 108, 45 S. Ct. 332, 69 L. Ed. 527, 38 A.L.R. 131; *Dimick v. Schiedt,* 293 U. S. 474, 478, 55 S. Ct. 296, 79 L. Ed. 603, 95 A.L.R. 1150. It then rested on the Act of 31 Charles II, 1679. Its preamble 'recited that great delays had been used in making returns to writs of habeas corpus in criminal or supposed criminal cases. To remedy this s. 1 of the statute enacted that in such cases the return should be made within three days after the service of the writ if the place where the prisoner is detained is within twenty miles from the court, and if beyond the distance of twenty miles and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days after the delivery of the writ, and not longer. * * *' Halsbury Laws of England; cf. *Ex parte Baez,* 177 U. S. 378, 388, 20 S. Ct. 673, 44 L. Ed. 813.

The present section 2243 of the Judicial Code is a codification of the Act of February 5, 1867, 14 Stat. 385, and accepts this Charles II prevention of delay. It provides that the writ must issue 'forthwith'. The Alcatraz Warden, being within ten miles of my chambers, must make his return in three days of the Act of Charles II, unless for good cause additional time not exceeding twenty days be allowed. To this has been added the requirement that the cause shall be set for hearing within five days unless for good cause additional time be allowed. The allowance of such time is controlled by the general provision that 'The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.'

> For these reasons the motion in Missouri to vacate petitioner's sentence is 'inadequate and ineffective to test the legality of (petitioner's) detention.' It is in no way a writ of habeas corpus and prevents the summary proceeding of the writ provided in the Constitution."

As yet there still has been no case determined by the United States Supreme Court where the issue of constitutionality of Section 2255 has been squarely presented and decided. The mere fact that other jurisdictions might have determined matters before them based on an assumption that 2255 is constitutional are not cases supporting the constitutionality of said section. It is a well known principle of law that the constitutionality of any statute or law will not be decided unless that issue is presented to the Court and there is a need in determining the question to also determine constitutionality of that particular law or statute.

In the cases cited by the learned Court in its opinion, appellee respectfully brings to this Court's attention that the case of *Jones v. Squier* is not a true test of the constitutionality of this section inasmuch as the petitioner therein had not filed his application under this section prior to seeking a Writ of Habeas Corpus. In fact the decision presupposes that action under 2255 is prerequisite to filing a petition for a Writ of Habeas Corpus.

Barrett v. Hunter, 180 F. (2d) 510 (Cir. 10), might be some support to the Court's opinion, but we again

quote the following paragraph which we believe is particularly applicable to this case:

> "Section 2255 does not in our opinion apply to applications for a writ predicated on fact arising after the imposition of sentence, such as, for example, where the sentence has been fully served, and the prisoner is unlawfully thereafter detained in custody."

The main case cited by the Court is that of *Winhoven v. Swope*, 195 F. (2d) 181 (Cir. 9), but in that case it appears that the petitioner had been sentenced by the District Court of the Ninth District. It appears that this was not a case involving a person who was sentenced by a Court of one district and incarcerated within another district. From the opinion it appears that the sentencing Court is also the Court to which any Writs of Habeas Corpus would have to be filed. This is shown from the fact that the attorney for the petitioner asked the Court to consider the petitioning for a Writ of Habeas Corpus as a second motion under Section 2255.

We feel therefore that the cases cited by the Court in its decision do not face the issue presented by the facts of this case.

It (habeas corpus) has been the greatest bulwark of freedom against tyranny, oppression and injustice.

> "The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints, upon personal liberty. . . . The most important result of such usage has been to afford

> a swift and imperative remedy in all cases of illegal restraint upon personal liberty."
>
> *Price v. Johnston,* 334 U.S. 266, 269, 283, 68 S.Ct. 1049, 1092.

Any statute which might tend to weaken its efficiency or delay its availability or make its use more difficult should be carefully considered and construed liberally in the light of its history and its benign purposes.

> "Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. . . . Only in that way can we give substance in this case to our previous statement that 'dry formalism should not sterilize procedural resources which Congress has made available to the federal courts.' "
>
> *Price v. Johnston,* 334 U.S. 283, 284, 68 S.Ct. 1059.

We felt that inasmuch as the Court did not discuss the second question presented in our original reply brief, to-wit:

> "Can there be consecutive sentences for 'entering a bank with intent to commit bank robbery and putting in jeopardy the life of a person by the use of a dangerous weapon'?"

and from the further fact that this Court set forth in its opinion that petitioner should seek executive

clemency, there is no need or necessity to brief this point, inasmuch as the law would be in our favor.

We respectfully urge the Court to grant this petition for rehearing.

Dated, San Francisco, California,
August 17, 1955.

Respectfully submitted,
MORRIS M. GRUPP,
ALBERT E. POLONSKY,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
August 17, 1955.

MORRIS M. GRUPP,
Of Counsel for Appellee and Petitioner.

Nos. 14,515 and 14,501

IN THE

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.*	No. 14,515
IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	
THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14,501

NOTICE OF MOTION, MOTION TO CONSOLIDATE APPEALS and MEMORANDUM OF APPELLANTS SUGGESTING HEARING EN BANC.

LEROY R. GOODRICH,
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Attorney for Appellants.

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
Counsel.

Nos. 14,515 and 14,501

IN THE

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.*	No. 14,515
IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	
THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14,501

NOTICE OF MOTION TO CONSOLIDATE APPEALS AND FOR HEARING EN BANC.

To Appellee, The Western Pacific Railroad Company, and to Its Attorneys, Allan P. Matthew, James D. Adams, Burnham Enersen and Robert L. Lipman, Esqs.:

You will please take notice that on Monday, October 18, 1954, at 10:00 o'clock a.m., or as soon thereafter as

counsel can be heard in the Courtroom of the above entitled Court in the Post Office Building, Seventh and Mission Streets, San Francisco, California, appellants, Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, will bring on the aforesaid motion for hearing before the above entitled Court.

Dated, September 27, 1954.

Western Pacific Railroad Corporation
and
Alexis I. du Pont Bayard, Receiver,
Appellants,

By LEROY R. GOODRICH,
Their Attorney,

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
Counsel.

Nos. 14,515 and 14,501

IN THE

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.*	No. 14,515
IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.* — THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14,501

MOTION OF APPELLANTS FOR AN ORDER CONSOLIDATING APPEALS AND FOR HEARING THEREON BY THE CIRCUIT JUDGES SITTING EN BANC.

Appellants, The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully move the Court for an order consolidating their appeals in the above entitled matters and for the hearing thereon by the Circuit Judges sitting en banc.

This motion is based upon the complaint and amended complaint filed by the appellants in Civil Action No. 33,514 in the District Court, and upon the orders, judgments and decrees and the pleadings, papers and all other files and records certified by the District Court to this Court in each of the above entitled proceedings, together with the "Memorandum of Appellants Suggesting Reasons for Hearing of These Appeals by the Circuit Judges Sitting En Banc", which memorandum is filed herewith and made a part hereof.

Said motion is further based upon the following facts:

(1) That the matters involved and the issues raised in each of said appeals are so interrelated that, either in oral argument or in the presentation of these issues by either the appellants or the appellees in written briefs, it would be impossible for the parties to present these issues separately without great repetition, expensive to the parties and onerous and burdensome to the Circuit Judges, and

(2) That in the hearing in the District Court upon the issues presented in these two matters and to save time and expense to the District Court and to the parties, the presentation and argument of the questions involved was, by stipulation and by permission of the Court, made in one hearing and contemporaneously.

Appellants respectfully pray that this Court make an order for the consolidation of said appeals for briefing, hearing and argument and, for the reasons

set forth in the memorandum of suggestion filed herewith, for the hearing thereof by the Circuit Judges sitting en banc.

Dated, September 27, 1954.

Western Pacific Railroad Corporation
and
Alexis I. du Pont Bayard, Receiver,
Appellants,

By LEROY R. GOODRICH,
Their Attorney,

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
Counsel.

Nos. 14,515 and 14,501

IN THE

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.*	No. 14,515
IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	
THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14,501

MEMORANDUM OF APPELLANTS SUGGESTING REASONS FOR HEARING OF THESE APPEALS BY THE CIRCUIT JUDGES SITTING EN BANC.

Availing of the right recognized in the opinion of Chief Justice Vinson in *Western Pacific Railroad Corporation et al. v. Western Pacific Railroad Company et al.* (345 U.S. 247) the Appellants respectfully suggest that these appeals present special circumstances

and important implications which justify the exercise of the *en banc* power as established by the Supreme Court in *Textile Mills Securities Corporation v. Commissioner* (316 U.S. 326) and confirmed by 28 U.S.C. Sec. 46(c).

Among reasons underlying the Appellants' suggestion are the following:

The principal appeal is from an order of the District Court made by Judge Louis E. Goodman, which grants a motion of the Appellee Western Pacific Railroad Company for a summary judgment afterwards entered dismissing a successoral Bill of Complaint brought by the Appellants against the Western Pacific Railroad Company to implement and give effect to the decision of this Court in *Western Pacific Railroad Corporation et al. v. Western Pacific Railroad Company et al.* (197 F.2d 994) rendered October 29, 1951, and being No. 12506 on the then docket of this Court. For convenience a copy of the amended successoral Bill of Complaint is annexed.

The secondary appeal is from an order adjudging the Appellants in contempt of Court for having filed the Bill of Complaint.

These appeals involve the final disposition of a fund of $17,201,739, with interest accretions from a date or dates not later than March 15, 1944.

The amount is stupendous, which is one of the reasons specified by Justice Frankfurter that might justify resort to the collective wisdom of all Circuit Judges.

This fund is held by the Appellee Western Pacific Railroad Company under a claim of complete beneficial ownership notwithstanding (1) that not a single judge has ever admitted the validity of its claim and not less than two well considered judicial opinions, one by Justice Jackson and one by District Judge Fee, now a member of this Court, and an impressive article in the Harvard Law Review, have strongly asserted its invalidity; and, as we further respectfully represent, (2) that its invalidity is implicit in the opinion of the majority of the three judge panel which rendered the decision of this Court in No. 12506. This opinion written by District Judge Byrne was concurred in by Circuit Judge Healy.

The Appellants suggest that the views of Circuit Judges Healy and Fee, though assumed to be divergent, are soundly reconcilable and that such a reconciliation is a function which may be appropriately performed by all active Judges of this recently enlarged Court of Appeals sitting *en banc.*

A brief historical sketch will put the point of divergence in true focus, and in considering its implications it will be helpful always to bear in mind the fundamental requirement in our jurisprudence that any legislative enactment and any judicial determination should conform to the obvious dictates of reason and common sense: that even the letter of the law may be changed to avert an absurd and indefensible result.*

*The background of this principle and the earlier cases are supplied by the opinion of Circuit Judge Learned Hand in *Cabell v. Markham* (48 F2d 737 (2 Cir.)).

Although this sketch must be radically condensed, it will give the Court the salient features of the case.

In 1935 the Western Pacific Railroad Company, as debtor, filed a petition for reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. 205), and Thomas M. Schumacher and Sidney M. Ehrman were appointed and confirmed as Trustees. A plan of reorganization effective as of January 1, 1939 was certified by the Interstate Commerce Commission to the District Court at San Francisco and was approved by the District Court August 15, 1940. On Appeal to this Court, the action of the District Court was reversed, and on March 15, 1943, under writ of *certiorari* the decision of this Court was reversed by the Supreme Court and the order of the District Court was reinstated (318 U.S. 448).

Under the Commission's plan of reorganization the debtor's capital stock was declared to be without value and no provision was made therefor. Full compensatory treatment was accorded some but not all of the secured creditors and there was no provision made for unsecured creditors.

The case in the Supreme Court was argued October 13 and 14, 1942, and was decided March 15, 1943.

At that time the revenues of the debtor Western Pacific Railroad Company, by reason of the national defense program, were surging upwards to unprecedented levels, and the Western Pacific Railroad Corporation, as owner of all of the debtor's capital stock, which had been adjudged by the Interstate Commerce

Commission to be without value in its 1939 appraisals, contended in the Supreme Court that the property should be revalued to give effect to its current earning power. The supporters of the plan asked that "that issue . . . should be faced squarely by this (the Supreme) Court" but urged that the argument took "no account . . . of the increasingly heavy Federal income and excess profits taxes necessarily resulting from the very facts which give rise to the increased revenues". The Court then "in the interest of advancing the solution of as many problems in reorganization as possible . . . deliberated upon the effect to be given these unexpectedly large earnings" and in upholding the plan noted that "the effect of taxation is not wholly answered by the deduction of tax estimates on the basis of present rates" (318 U.S. 507, 508). In the Milwaukee reorganization case decided the same day and which had been argued at the same time, the identical problem was discussed more fully and the Supreme Court concluded that "the bulge of war earnings" furnished no standard because, among other reasons, of the "great increase in taxes".

While these test cases were under submission in the Supreme Court Congress, by the Revenue Act approved October 21, 1942, inserted in Section 23 of the Revenue Code the paragraph numbered (g)(4) set out in the annexed Bill of Complaint, which gave a stock loss sustained by the parent of a consolidated group the status of an operating loss deductible from all consolidated income instead of only, as theretofore, from capital gains.

As the effect of this new provision of Section 23, Congress remitted the taxes on the war revenues of the Trustees of the debtor Western Pacific Railroad Company since all of its capital stock owned by Western Pacific Railroad Corporation had been declared to be without value and *taxwise* all of the operations of the consolidated group constituted a single business, owned by a corporate parent; but there was no such remission of the equally heavy taxes on the war revenues of the Milwaukee road, whose stock, similarly declared to be without value, was scattered among individual and corporate investors.

Unless the remitted taxes on the swollen war revenues of the Trustees of the Western Pacific Railroad Company were intended to be covered into the Treasury of the Western Pacific Railroad *Corporation,* which had suffered the loss, the Act of Congress providing for such remission while exacting full taxes from the Milwaukee road was not only plainly discriminatory but failed also to conform to the obvious dictates of reason and common sense.

Hence on October 10, 1946, the Appellant Western Pacific Railroad Corporation filed suit against the defendant Western Pacific Railroad Company to require it to account under its Assumption Agreement for the liability of the Trustees of the Western Pacific Railroad Company arising from their use of its tax credit under 23(g)(4) and to transfer the remitted taxes to the Western Pacific Railroad Corporation. This case was tried before District Judge Goodman, whose opinion is quoted at length in the annexed Bill

of Complaint. The Judge was clear in his own mind that Congress did not intend to remit taxes to be retained by the Trustees. He said:

> "To assume, however, that the Congress intended by 23(g)(4) to statutorily authorize what was done in this case is to attribute plain stupidity to the Congress of the United States—an unthinkable procedure despite the general habit of criticism both fair and unfair."

Nevertheless, Judge Goodman, without attempting to give a reasonable effect to the Act of Congress by ordering the remitted taxes to be turned over to the Western Pacific Railroad Corporation, whose loss was the basis of the remission and the source of the fund, and thereby conform to the basic rule that absurd and indefensible results are to be avoided, grudgingly left it in the possession of the reorganized Western Pacific Railroad Company under an obvious misapplication of the principle of *res adjudicata.*

Judge Goodman is No. 1 on the list of judges who believe that in equity and good conscience the remitted taxes could not beneficially belong to the reorganized Western Pacific Railroad Company. To quote briefly his own spirited language:

> "The Court cannot cause these taxes to be paid where they should be paid, to the United States. But as between the parties no persuasion of conscience or equity impels me to do otherwise than to leave the parties where they are, the defendant with its amazing and undeserved tax success; the plaintiff, as the reorganization decree left it, without interest in the debtor."

There was an appeal to this Court resulting in the affirmance by a divided three-judge panel of the judgment of the District Court dismissing Accounting Action No. 12506. The majority opinion written by Judge Byrne was concurred in by Circuit Judge Healy. There was a dissenting opinion written by the then District Judge Fee. As we shall hereinafter show, not one of these three judges expressed an opinion that the reorganized Western Pacific Railroad Company was in equity and good conscience entitled to retain the remitted taxes as the beneficial owner. Judge Fee was of the opinion that the remitted taxes should be transferred to Western Pacific Railroad Corporation as the parent of the consolidated group whose loss of investment in the Western Pacific Railroad Company was the basis of the tax remission. Judge Fee said:

> "If the plaintiff were still the owner of the stock of the defendant Railroad Company then the allocation of $17,000,000 to defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in the value of stock in the defendant no longer is of avail to the plaintiffs there should be another method of applying the remission to the loss."

Judge Fee is No. 2 on the list of judges who believe that the remitted taxes are not beneficially owned by the defendant Western Pacific Railroad Company.

Judges Healy and Byrne were of the opinion, as shown in the successoral Bill of Complaint, that the

Appellant Western Pacific Railroad Corporation was under a fiduciary duty as sole owner of the lost stock investment in the debtor subsidiary to use its special tax credit under Section 23 (g)(2)(4) for the benefit of the creditors of the subsidiary whose untaxed swollen war earnings created the fund. Their view must be that the remitted taxes belong in equity and good conscience to the creditors and holders of other securities of the bankrupt to whom the Western Pacific Railroad Corporation owed the fiduciary duty, and in very clear language their opinion so states.

Judges Healy and Byrne accordingly are here counted as Nos. 3 and 4 on the list of judges who believe that the remitted taxes are not beneficially owned by the reorganized Western Pacific Railroad Company.

On application of the present Appellants, the Supreme Court granted a writ of *certiorari* to review the divided determination of the three judge panel which includes an order denying a rehearing and an order striking from the files a petition of the Appellants for a rehearing *en banc*.

This Court is familiar with the decision of the Supreme Court which is cited in the opening paragraph of the Memorandum. The orders on the petition for rehearing were vacated and the Court was directed to formulate a Rule to regulate the *en banc* power as confirmed by Section 46(c).

Justice Jackson dissented from this action and wrote an opinion on the merits, in which he said:

> "Indeed it is probable that the intention of the statute permitting the consolidation of the two positions was to provide salvage for the loser, not profit for one who sustained no loss."

Justice Jackson is No. 5 on the list of judges who believe that the remitted tax moneys are not beneficially owned by the reorganized Western Pacific Railroad Company. In addition to these five opinions, reference also should be made to 65 Harvard Law Review 1449.

Following the action of the Supreme Court a Rule was formulated by this Court under which the case was referred back to the original panel consisting of Circuit Judge Healy and District Judges Fee and Byrne. The panel again denied a rehearing, Judge Fee being recorded as not participating. A second petition for a writ of *certiorari* was denied by the Supreme Court, the result being that the original decision of Judges Healy and Byrne in this Court became "the law of the case".

Let it be noted at this point that the decision of Judges Healy and Byrne in effect was an affirmance of the judgment of the District Court, not upon either ground specified by District Judge Goodman, but upon the ground that the reorganized Western Pacific Railroad Company was not accountable to Western Pacific Railroad Corporation as its *sole* pre-reorganization stockholder because the superior equity of pre-reorganized creditors supervened. Necessarily the superior equity belonged only to the creditors for whom no provision or inadequate provision was made

under the plan of reorganization which had been approved by the District Court. Assuming that the fiduciary duty of the parent of a wholly owned subsidiary to the subsidiary's creditors can be carried as far as is indicated by the opinion of Judge Byrne—we had thought the Supreme Court's treatment of Accommodation Collateral question in the reorganization case was not entirely consistent with that idea—it certainly can only be extended to those creditors not fully and adequately provided for in reorganization.

The provision for creditors made by the plan of reorganization presented the critical issue under the decision of Judges Healy and Byrne.

There were three classes—

(1) First Mortgage Bondholders holding a senior lien on the entire estate of the Bankrupt;

(2) Secured Noteholders, collateralized by Second Mortgage Bonds, having a lien on the entire estate of the bankrupt *wholly subordinate* to the First Mortgage;

(3) Unsecured Creditors.

The Interstate Commerce Commission found, and the District Court approved the finding, that the estate of the Bankrupt was sufficient to provide in full for the holders of First Mortgage Bonds and to permit a redundancy of $5,964,296 to be applied toward satisfaction of creditors collateralized by Bonds issued under the wholly subordinate Second Mortgage. This unneeded excess was distributed among the three

Secured Noteholders, all being thereby made whole, except one, which suffered a deficiency of $3,683,175. The unsecured creditors, neither of which received anything on their claims as allowed in the Bankruptcy proceedings, are—

Western Pacific Railroad Corporation, $7,609,-370

Western Realty Company, $60,910

It is now our considered judgment that Judges Byrne and Healy were right in their conclusion that the claim of Western Pacific Railroad Corporation to the remitted taxes was subordinate to the claims that might be asserted by the creditors not receiving full compensatory treatment under the plan of reorganization; and these are those listed above. Further, it is our considered judgment that the superior equity of these unsatisfied creditors would have been enforceable against the fund even if it had been transferred to the Appellants in accordance with the dissenting opinion of Judge Fee; and we do not doubt that Judge Fee himself will concur in this view as being mandatory under the decision of the Supreme Court in *Northern Pacific Railway Company v. Boyd,* 228 U.S. 482. It would be unreasonable and inadmissible under established principles of equity to hold that Congress intended salvage for the loss of the parent's stock investment in a subsidiary unless and until the creditors of the subsidiary had been or were being provided for in full.

Nor do we doubt that Judges Healy and Byrne would not countenance, consciously, the use of the

fund of $17,201,739 further to fatten the obese senior lien creditors who constitute the reorganized Western Pacific Railroad Company and who were so fully and amply provided for out of the Bankrupt's trust estate that, after taking all of it that was needed to do so, there was a redundancy of $5,964,296 passed *down* to creditors secured by a wholly subordinate lien,—an amount sufficient to provide full payment for some creditors but not a single penny for other creditors having valid unsatisfied claims allowed in the Bankruptcy proceeding amounting to $11,358,835.

Apparently the District Court was grievously misled as to the status of these valid, subsisting claims. *And how this happened need not be left to conjecture.* The Appellee's counsel quoted out of context the following provision of the Bankruptcy Court's order of November 27, 1944:—the reorganized Company "shall assume only the valid obligations of the debtor or the debtor's Trustees other than unsecured claims against the debtor not entitled to priority over existing mortgages, *which unsecured claims are hereby cancelled and discharged*". The significance of this provision, *and its limitations,* are obvious when its context is revealed. The Order wherein the provision occurs was part of the machinery necessary under Section 77 in carrying into effect an approved plan of reorganization under the debtor's existing charter. It was a *sine qua non* that the slate be clean and that unsatisfied pre-reorganization claims should be cancelled and discharged *as to it.* But the Bankruptcy Court had no power whatever to cancel and discharge *generally* any

valid indebtedness allowed against the pre-reorganized debtor so as to prevent its enforcement against a solvent guarantor or against any property not belonging to the debtor which might be available for its satisfaction, such as pledged Accommodation Collateral or any property, including a tax credit belonging to the parent which by reason of its fiduciary obligation to the holders of its wholly owned subsidiary's unsatisfied indebtedness the parent may be equitably bound to apply to that purpose.

By way of legitimate emphasis in a case of this importance, let us point out more clearly the strange position of the District Court.

In the reorganization proceeding No. 25591-S it approved a plan which gave to the bankrupt's secured creditors the entire trust estate *ex* the fund $17,201,739 arising under the special statute limited to holding companies which was not passed until *after* certification of the plan fixing the rights of the parties under which the debtor's secured creditors became in corporate form the reorganized Western Pacific Railroad Company. In so doing the Court approved a determination that out of the Bankrupt's estate *ex* the fund $17,201,739, the senior lien creditors would be fully satisfied, leaving $5,964,291 to spare toward paying off the creditors whose claims were collateralized by a *wholly* subordinate lien. The entire trust estate, together with the $17,201,739 fund, was afterwards transferred in corporate form to the creditors participating in the plan; subject, however, to an Assumption Agreement clearly embracing any liability

of the Trustees to account for their use of the tax credit of Western Pacific Railroad Corporation. Accountability of the Trustees to Western Pacific Railroad Corporation was resisted by the reorganized Western Pacific Railroad Company on the ground that being the Bankrupt's *sole* stockholder it was under a fiduciary duty to use its tax credit for the benefit of the Bankrupt's creditors which, again resorting to the rule of reason and common sense, can only mean the creditors not fully provided for under the plan. This position was clearly and forcefully upheld by the majority opinion in this Court of Judges Healy and Byrne; but in dismissing the successoral Bill of Complaint the District Court apparently intends to give the entire fund of $17,201,739 to the senior creditors already fully compensated under the plan and allow nothing whatever to the unpaid creditors whose superior equity was the basis for the dismissal of the Appellants' accounting Action No. 12506.

In all sincerity we respectfully suggest that if this result is permitted to remain undisturbed the District Court is put in a strange position where it appears to condone what, except for the absence of concealment and deceit, we are utterly unable to distinguish from the kind of fraud on creditors for which in the normal routine of its judicial duties the Court is accustomed to send offenders to institutions such as nearby Alcatraz.

At the risk of repetition and as a fair summary of this amazing case—these are the facts:

(a) The Supreme Court approved the determination that the Western Pacific Railroad Corporation's stock investment in the Bankrupt subsidiary was without value and was a total loss because the bankrupt's revenues in a period of two years and four months amounting to more than $21,000,000 (which, if untaxed, would provide more than $50 for each share of its preferred stock) would be largely absorbed by federal income and excess profits taxes; (b) the Trustees of the Bankrupt subsidiary thereupon caused this stock loss belonging exclusively to Western Pacific Railroad Corporation as the corporate parent of the consolidated group to be used to effect a remission of the very taxes the exaction of which was the underlying factor creating the loss; (c) the plan of reorganization so approved and remanded to the District Court accorded full compensatory treatment to the Bankrupt senior lien creditor out of their own security, leaving $5,964,291 to pass down to the junior lien on the ground that that redundancy of security remained after the senior lien holders had been fully satisfied and discharged; (d) $5,964,291 of the debtor's estate was then passed down to the creditors holding debtor's obligations secured by a wholly subordinate lien which was sufficient to satisfy *in full* all such creditors except one that was left with a deficiency of $3,681,175; (e) the Accounting Action No. 12506 brought by the Appellant Western Pacific Railroad Corporation to require the Appellee Railroad Company to account under its Assumption Agreement for the value of the use by its Trustees of the stock loss

belonging to the Western Pacific Railroad Corporation was dismissed under mandate of this Court on the ground that the parent was under a fiduciary duty to use its stock loss, or the taxes remitted thereagainst, for the benefit of the debtor's creditors; and, finally (f) a successoral Bill of Complaint forthwith filed by the Appellants designed to implement this Court's decision by requiring the reorganized Western Pacific Railroad Company to apply the remitted taxes to this incontestably equitable objective was summarily dismissed by the District Court and the Appellants were adjudged to be in contempt of Court for having filed it—a determination which, if permitted to remain unreversed, will give the entire fund of $17,201,739 to lien creditors already with one exception fully paid and discharged, and will give nothing whatever to creditors having valid claims allowed in the Bankruptcy proceeding, amounting to $11,358,855.

The prevention of such a result as a sequence, if not a consequence, of one of this Court's own decisions is a special circumstance warranting, we suggest, an exercise of the *en banc* power under Section 46(c).

The appeal from the contempt order presents an independent reason for a hearing *en banc*. It will be difficult for the Appellee to deny that the contempt proceeding was a rather patent effort by threat and coercion to avert a review in this Court of a vulnerable order it anticipated would be entered in the District Court for a dismissal of the successoral Bill of Complaint. The protection of the appellate jurisdiction

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of this Court and the right of a litigant freely and uninhibitedly to invoke it is certainly the collective responsibility of all Circuit Judges.

To meet the moral challenge of these appeals, all that the Appellee has to offer is to repeat the technical defenses such as laches, limitation and the bar of the irrelevant decree in bankruptcy which were ignored by this Court in No. 12506 and are plainly invalid under the decision of the Supreme Court in *Northern Pacific Railway Company v. Boyd,* already cited.

This litigation was characterized as "aged" in the opinion written by Justice Jackson.

It is our belief, which we will develop on the hearing, that if the pending appeals are heard by this Court sitting *en banc,* the litigation can be terminated under this Court's mandate without further proceedings in the District Court, and that on the existing unimpeachable record this Court can place every penny of the huge fund precisely where it belongs and where Congress intended that it should go, including interest accruals and legal expenses chargeable against the fund—all in accordance with the prayer of the annexed successoral Bill of Complaint.

The foregoing is most respectfully submitted as amply justifying the Court's resort to the *en banc* power.

Recognizing as we must that it may be difficult for all active Circuit Judges to convene at the same time and place to hear these appeals, the Appellants will

stipulate to submit on Briefs as to any judge or judges unable to attend oral argument.

Dated, September 27, 1954.

Western Pacific Railroad Corporation
and
Alexis I. du Pont Bayard, Receiver,
Appellants,

By LEROY R. GOODRICH,
Their Attorney,
FRANK C. NICODEMUS, JR.,
*WILLIAM MARVEL,
Counsel.

*Mr. Marvel participated in the preparation of this Memorandum prior to September 10, 1954 when he retired to become Vice Chancellor of Delaware. He is succeeded as counsel for receiver Bayard by James R. Morford.

No. 14515

United States
Court of Appeals
for the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver,

Appellants.

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Appellees.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-24-54

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In the District Court of the United States for the Northern District of California, Southern Division

Civil Action No. 33514

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver,

Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants.

AMENDED BILL OF COMPLAINT

To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division:

The Amended Bill of Complaint (hereinafter referred to as the complaint) of Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully shows:

First: Western Pacific Railroad Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and Alexis I. du Pont Bayard is Receiver of Western Pacific Railroad Corporation duly appointed by the Chancery Court of the State of Delaware in and for the County of New Castle (hereinafter referred to as the plaintiffs); and both of said plaintiffs are citizens and residents of the State of Delaware.

Second: The Western Pacific Railroad Company was the original petitioner in the reorganization proceedings under Section 77 of the Bankruptcy Act numbered 26591-S on the docket of this Court, the history of which, so far as material to this complaint and except as amplified herein, is judicially stated and found by the Honorable Louis E. Goodman, United States District Judge, in a certain action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508—Civil," to be as follows:

"Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the 'debtor'; defendant, the reorganized subsidiary is The Western Pacific Railroad Company.

"Statement of Facts

"Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission, 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value

and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court (318 U. S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor (318 U. S. 508, 509).[1] Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plain-

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"[1]See in re Denver & R. G. W. R. Co. 10 Cir. 150 Fed. 2d 28 and F. F. C. v. D. & R. G. R. Co. 328 U. S. 495, where similar holdings upon similar contentions were made.

no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

"Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.[4]

"On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain

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"[4]The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commission or Court.

stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

"On December 17, 1947, plaintiff filed a supplemental bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated return for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control.'

"In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some $17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

"After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

"The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

"A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

"But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

"Discussion

"The income tax picture presented is bizarre indeed. It is 'paradoxical,' as the defendant's tax attorneys put it.[5] The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of $21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization

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"[5]In a letter dated May 20, 1943 (plff. Ex. 50), addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: 'This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.' (Interlineation supplied.)

Court to be valueless. But the tax attorneys for the defendant conceived a 'paradoxical' plan. They decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder[6] affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942 (26 USC Sec. 23(g)4).[7] Thus, part of the lost $75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the $21,346,567 tax would be paid.

"This was more than mere tax 'saving'; it amounted to a complete tax 'escape.' But the debtor had already paid $4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of 'carry-back,' part of the $75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or 'escape' offered for the three years in question, the claim for refund was waived and the Commissioner then

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"[6]Sec. 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

"[7]See footnote # 3.

accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that the debtor paid $4,144,828 taxes to the United States in order to escape the $21,346,567 previously mentioned, or a net saving or 'escape' of $17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (Sec. 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid $4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.[8]

"How the amendment to the statute, Sec. 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

"Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These

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"[8]It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns."

limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses, 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938."

Third: As the result of the various steps outlined in the foregoing quoted part of the opinion of the District Court, which was formally adopted by the District Court as its Findings of Fact, a net fund amounting to $17,201,739 is in the possession of the Western Pacific Railroad Company, having been transferred to it by Thomas M. Schumacher and Sidney Ehrman, Trustees, subject to an Assumption Agreement whereby it assumed:

"Generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's property by the said Trustees, or their conduct of the debtor's business."

Fourth: The Plan of Reorganization of the debtor referred to in the opinion quoted above was cer-

tified to the District Court by the Interstate Commerce Commission June 21, 1939, and was approved by the District Court August 15, 1940, at a time when a loss resulting from the worthlessness of securities owned by a holding corporation, in which category petitioner Western Pacific Railroad Corporation belongs, could be offset only against capital gains occurring in the same tax period, but on October 21, 1942, Congress inserted in the following provision of the Internal Revenue Code forming part of Section 23 the paragraph thereof numbered (g)(4):

"Deductions from gross income. In computing net income there shall be allowed as deductions:

"* * *

"(g)(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange on the last day of such taxable year of capital assets.

"* * *

"(4) Stock in affiliated corporations. For the purpose of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purpose of this paragraph a corporation shall be deemed affiliated only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and * * *"

Fifth: The enactment of the foregoing Section

23(g)(2)(4) on October 21, 1942, authorizing restoration out of consolidated taxable income of the lost capital of the parent invested in the securities of a subsidiary could not have been reasonably anticipated or foreseen by the Interstate Commerce Commission on June 21, 1939, when it certified the Plan of Reorganization to this Court, and on October 10, 1946, the plaintiffs Western Pacific Railroad Corporation filed in this Court the suit hereinbefore referred to (in which suit at a subsequent stage Alexis I. du Pont Bayard was added as an additional plaintiff) against Western Pacific Railroad Company, the debtor in the Bankruptcy proceedings 26591-S and the obligor under the Assumption Agreement hereinbefore mentioned, and also against the additional parties named in the subjointed footnote as defendants,* praying an accounting by the reorganized Western Pacific Railroad Company in respect of the use under federal consolidated income and excess profits tax returns of the plaintiffs' tax credit in the amount necessary to effect a relinquishment of its taxable income up to $17,201,739 under Section 23(g)(2) and (4) set out above. The subsequent history of this accounting proceeding and the antecedent history of Section 77 proceeding for the reorganization of the debtor Railroad Company are within the judicial knowl-

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*The Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company, and Delta Finance Company, Ltd.

edge of this Court, as revealed by the official reports in chronological order cited below.*

Sixth: Under the Internal Revenue Code and the Regulations of the Treasury of the United States thereunder, the plaintiff Western Pacific Railroad Corporation was free to join or refuse to join in consolidated returns as it saw fit, and was under no statutory duty to file consolidated returns and was free to make its own decision whether to file or not to file on the basis of its own interests.** But the Court of Appeals held (Judge Fee dissenting) in response to repeated assertions of the defendant Railroad Company that it had not paid its pre-reorganization debts and that the plaintiff Western Pacific Railroad Corporation was under an equitable duty as fiduciary to join in consolidated re-

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*Western Pacific Railroad Company Reorganization, 230 I.C.C. 61; 233 I.C.C. 409; in re Western Pacific Railroad Company, No. 26591-S, 34 F. Supp. 493; Western Pacific Railroad Company vs. Reconstruction Finance Corporation, et al., and four other cases, No. 9712, 124 Fed. 2d 136 (1941); Ecker and others vs. Western Pacific Railroad Corporation, et al., 318 U. S. 418 (1943); Western Pacific Railroad Corporation vs. Western Pacific Railway Company, et al., No. 26508, 85 F. Supp. 869 (1949); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 197 Fed. 2d 994 (1951); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 345 U. S. 247 (1953); and after remand 205 Fed. 2d 374, 206 Fed. 2d 495.

**Treasury Regulation 109, Sec. 23—16a and 11a —Duke Power Company v. Commission, 44 Fed. 2d 543, 545 (4 Circuit).

turns and thereby donate its tax credit and the avails thereof to the reorganized defendant Railroad Company because its creditors had not been fully paid. The following is from the prevailing opinion written by Judge Byrne:

"The Corporation was the sole owner of the subsidiary's (the debtor's) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Products Co. v. Du Bois (312 U. S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

The plaintiffs are bound by and accept this determination of the Court of Appeals, and their purpose and objective in filing this successoral complaint is to provide the essential machinery or medium for implementing it and requiring the reorganized Western Pacific Railroad Company, as in duty bound under its Assumption Agreement as the trustee-custodian of the fund also to accept it and to carry it into effect.

Seventh: The doctrine of Consolidated Rock Products Company vs. Du Bois (312 U. S. 510) is that junior interests in a bankruptcy or equity administration proceeding cannot be given any part or securities representing any part of the debtor's estate unless and until full compensatory treatment

is given for the entire bundle of rights which the senior creditors surrender. In the proceeding 26591-S, the Plan of Reorganization approved by this Court and by the Supreme Court of the United States allotted to the senior creditors, in full satisfaction of their claims, securities representing in the determination of the Interstate Commerce Commission and of the Court the full value of their claims without resorting to an excess value of the senior liens which they surrendered; and thereupon gave a residue valued at $5,964,296 to creditors secured by liens wholly subordinate to the liens held by the senior creditors. It is accordingly res adjudicata in the proceeding 26591-S that any fiduciary duty of the plaintiffs Western Pacific Railroad Corporation to donate its special tax credit, or taxes remitted there against, under Section 23(g)(2)(4) is one to be exercised for the exclusive benefit of the creditors of the debtor Western Pacific Railroad Company left unprovided for or inadequately provided for under the Plan of Reorganization approved by the Supreme Court of the United States in Ecker vs. Western Pacific Railroad Corporation, 318 U. S. 448.

Eighth: In the exercise of its jurisdiction in the proceedings 26591-S, the Interstate Commerce Commission determined the amount of the indebtedness of the debtor as of January 1, 1939, for which full compensatory treatment was not accorded under the Plan of Reorganization to be $13,914,530, of which $6,249,750 was due and owing to the A. C. James

Company; $7,609,370 was due and owing to the plaintiff Western Pacific Railroad Corporation, and $60,410 was due and owing to Western Realty Company. The claim of the A. C. James Company was liquidated in part out of collateral pledged by the debtor (junior lien bonds of the debtor or new securities issued thereagainst and substituted therefor) and the unliquidated balance as shown by an exhibit introduced by the defendant Railroad Company in said action "No. 26508 Civil" is $3,495,000 but is subject to adjustment bringing it up to $3,683,175.* In addition to the creditor claims so determined and allowed by the Interstate Commerce Commission the claim of plaintiff Western Pacific Railroad Corporation as owner of all of the debtor's preferred stock was allowed in the amount in excess of $40,000,000.**

Ninth: As hereinbefore alleged the plaintiffs are

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*In the exhibit introduced by the defendant Railroad Company to establish the deficiency of the A. C. James Company, it was charged with 37,635 shares of new common stock at $62 instead of its true currency value of $57 as fixed by the treatment accorded the senior lien creditors—exhibit (defendant's) No. 33, record page 2022.

**A secured claim of Railroad Credit Corporation was fully liquidated by the use of common stock pledged at $62 per share and certain Accommodation Collateral supplied by Western Pacific Railroad Corporation, the unused balance of which Accommodation Collateral was restored to Western Pacific Railroad Corporation under a decree of the Chancery Court of the State of Maryland.

filing this complaint as an independent or successoral action in equity to provide an essential machinery or medium for implementing the decree or judgment in said action "No. 26508 Civil" and for an administration of the trust arising thereunder or in consequence thereof and as a civil action in equity between citizens of different states, viz., the plaintiffs Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, both being citizens and residents of the State of Delaware and Western Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, as a defendant, wherein the amount in controversy greatly exceeds $5,000.00.

Tenth: James Foundation of New York, Inc., successor to the creditor position of A. C. James Company, is a corporation of the State of New York; and Western Realty Company is a corporation of the State of Colorado, and each being an unsatisfied creditor of the debtor, and as such a beneficiary of the trust created as hereinbefore alleged, is an interested but not an indispensible party to this proceeding, and being such both also have been named as parties defendant herein.

Eleventh: The reason why this complaint was not filed at a earlier date is that the status of the $17,201,739 fund in the custody of the reorganized Western Pacific Railroad Company, defendant herein, was not finally established until the denial of the second petition for certiorari at the present term of the United States Supreme Court in said

action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Rr. Co., et al., No. 26508-Civil."

Twelfth: While said second petition for certiorari was pending in the United States Supreme Court on application for rehearing, the plaintiff receiver wrote the President of the defendant Railroad Company as follows:

"If the Supreme Court denies our pending petition for a rehearing of the application for certiorari and establishes the position taken by your counsel throughout the litigation that the $17,000,000 fund in your custody is a trust fund for the satisfaction of the unpaid creditors of your company (pre-reorganization) it is our purpose to apply to the Bankruptcy Court for a proper application of the fund to that purpose. I am writing this in advance to put you and your directors on notice of our position."

No reply to or acknowledgment of said communication has been received by the plaintiffs but they are informed and allege that the defendant Railroad Company proposes to divert the fund to purposes other than the payment and satisfaction of claims of partially paid and wholly unpaid (pre-reorganization) creditors of the defendant Railroad Company and to utilize it for the enrichment of the creditors, and successors in interest of creditors that received full compensatory treatment under the Plan of Reorganization.

Wherefore, the plaintiffs pray:

(1) That this Court make cognizance of this cause and grant unto them a writ of subpoena of the United States directed to Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, named as defendants herein, service upon the two defendants last named to be made by the Marshal of the District wherein personal service may be effected;

(2) That this Court grant unto the plaintiff a judgment or decretal order adjudging that the fund of $17,201,739 in the possession of the reorganized Western Pacific Railroad Company is held by it subject to the Assumption Agreement executed by it pursuant to the order and decree of this Court in the proceeding 26591-S, and is held by it in trust for the benefit of the unpaid and unsatisfied creditors of the debtor in said proceeding 26591-S in order of their respective priorities and for the interests junior thereto as heretofore determined by the Interstate Commerce Commission;

(3) That this Court enter a preliminary order placing said fund of $17,201,739 in judicial custody and requiring and directing the defendant Western Pacific Railroad Company to hold said fund subject to the further order or orders of this Court which may include an order or orders providing therefrom currently for the expenses of the plaintiffs and their attorney and counsel in resisting the threatened conversion thereof; and

(4) That the plaintiffs may have such further relief by way of declaratory judgment or decree of

injunction, temporary or permanent, or both, or otherwise as to the Court may seem meet.

Dated: May 4, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, RECEIVER,

Plaintiffs;

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1954.

[Endorsed]: No. 14515. United States Court of Appeals for the Ninth Circuit. Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, Appellants, vs. Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed September 16, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Nos. 14,515, 14,501

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,*

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*

No. 14515

IN RE THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,*

THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*

No. 14501

Notices of Motions
Motions to Dismiss or Affirm
Points and Authorities

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN
1500 Balfour Building
San Francisco 4, California
Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
1500 Balfour Building
San Francisco 4, California
Of Counsel

Dated: October 5, 1954.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

No. 14515

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,
Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellee.

Notice of Motion to Dismiss the Appeals or Affirm the Judgment

---

To appellants, The Western Pacific Railroad Corporation and Alexis I. duPont Bayard, Receiver, and to Leroy R. Goodrich, Esq., their attorney:

PLEASE TAKE NOTICE that The Western Pacific Railroad Company, the appellee herein, will present to the above entitled Court its motion to dismiss the appeals or affirm the judgment herein on Monday, October 18, 1954, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, in the courtroom of the above entitled Court in the United States Post Office and Court House

Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN

Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Of Counsel

No. 14515

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,
Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellee.

Motion to Dismiss the Appeals or Affirm the Judgment

Comes now appellee and moves to dismiss the appeal from ne judgment below in favor of appellee or, in the alternative, o affirm that judgment, on the grounds that:

(a) This appeal is frivolous and presents no substantial question;

(b) This appeal is a contempt of court; and

(c) This appellate proceeding has been, and unless it is dismissed will continue to be, used by appellants for improper purposes of vexation and harassment.

Appellee moves to dismiss the appeal from the order of the District Court granting appellee's motion for summary judgment n the ground that:

(a) The order appealed from is an interlocutory non-appealable order.

This motion is based upon the attached affidavit of F. B. Whitman and memorandum of points and authorities and upon the records now on file in this Court.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN

Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Of Counsel

No. 14515

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,*

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*

Affidavit of F. B. Whitman

State of California
City and County of San Francisco—ss.

F. B. WHITMAN, being duly sworn, deposes and says:

1. I am the president of The Western Pacific Railroad Company, the appellee herein.

2. During the month of September 1954 The Western Pacific Company had in process a refinancing program pursuant to which the preferred stock of the company was in part to be called, with payment for the stock so called to be made in cash, and in part to be exchanged for income bonds. In compliance with applicable provisions of the Interstate Commerce Act The Western Pacific Railroad Company filed its application with the Interstate Commerce Commission for approval of this refinancing program and particularly for authority to issue and sell income bonds. On September 16, 1954, when the said application was pending before

the Interstate Commerce Commission and undetermined, I received from Alexis I. duPont Bayard, Receiver of The Western Pacific Railroad Corporation, a letter dated September 14, 1954. A true, full and correct copy of that letter is attached to this affidavit as Exhibit A.

3. I am informed and believe, and therefore allege, that a copy of that letter was sent by said Bayard to the Chairman of Division Four and to the Director of the Bureau of Finance of the Interstate Commerce Commission, and was received by them on or about September 16, 1954.

F. B. WHITMAN
F. B. Whitman

Subscribed and sworn to before me
this 5th day of October, 1954.

BERTHA P. LARSON
Notary Public
in and for the City and County
of San Francisco.
My commission expires Jan. 20, 1957.
[Notarial Seal]

EXHIBIT A

Alexis I. duPont Bayard
Star Building
Wilmington, Delaware

September 14, 1954

F. B. Whitman, Esquire
President
Western Pacific Railroad Company
San Francisco, California

Dear Sir:

This refers to your circular dated September 8, 1954 addressed to the holders of your company's Participating Preferred Stock. This circular embodies an offer stated to have been approved by your company's Board of Directors to exchange up to 225,000 shares of such stock for Debenture Bonds and Common Stock and representing that non-assenting stock together with 83,211 additional shares specified for redemption, will be redeemed at par plus accrued and unpaid dividends by use of your company's available cash.

Whether the lawyers representing Western Pacific Railroad Company should have permitted an exchange offer to be set in motion during the pendency of our appeals to the Court of Appeals involving the availability for use by your Company of any part of the $17,201,739 in your custody which, I contend, is impressed with in trust for other purposes, raises question as to which I express or imply no opinion.

But, since you are soliciting assents of your Participating Preferred Stockholders without disclosing the pendency of these appeals, which, if successful, will reduce your unappropriated surplus, represented to be $53,902,739 at June 30, 1954, to less than $36,700,500 and may so impair your cash position that you

the Interstate Commerce Commission and undetermined, I received from Alexis I. duPont Bayard, Receiver of The Western Pacific Railroad Corporation, a letter dated September 14, 1954. A true, full and correct copy of that letter is attached to this affidavit as Exhibit A.

3. I am informed and believe, and therefore allege, that a copy of that letter was sent by said Bayard to the Chairman of Division Four and to the Director of the Bureau of Finance of the Interstate Commerce Commission, and was received by them on or about September 16, 1954.

F. B. WHITMAN
F. B. Whitman

Subscribed and sworn to before me
this 5th day of October, 1954.

BERTHA P. LARSON
Notary Public
in and for the City and County
of San Francisco.
My commission expires Jan. 20, 1957.
[Notarial Seal]

EXHIBIT A

Alexis I. duPont Bayard
Star Building
Wilmington, Delaware

September 14, 1954

F. B. Whitman, Esquire
President
Western Pacific Railroad Company
San Francisco, California

Dear Sir:

This refers to your circular dated September 8, 1954 addressed to the holders of your company's Participating Preferred Stock. This circular embodies an offer stated to have been approved by your company's Board of Directors to exchange up to 225,000 shares of such stock for Debenture Bonds and Common Stock and representing that non-assenting stock together with 83,211 additional shares specified for redemption, will be redeemed at par plus accrued and unpaid dividends by use of your company's available cash.

Whether the lawyers representing Western Pacific Railroad Company should have permitted an exchange offer to be set in motion during the pendency of our appeals to the Court of Appeals involving the availability for use by your Company of any part of the $17,201,739 in your custody which, I contend, is impressed with in trust for other purposes, raises question as to which I express or imply no opinion.

But, since you are soliciting assents of your Participating Preferred Stockholders without disclosing the pendency of these appeals, which, if successful, will reduce your unappropriated surplus, represented to be $53,902,739 at June 30, 1954, to less than $36,700,500 and may so impair your cash position that you

will be unable to redeem the shares which it will be necessary to redeem, I respectfully suggest that your circular is fatally defective in withholding from your Preferred Stockholders full and correct information respecting the pending appeals.

Even if the Interstate Commerce Commission should approve the proposed exchange and authorize the new securities the transaction may well be invalidated by the Courts.

Accordingly we are sending a copy of this letter to the Chairman of Division 4 and to the Director of the Bureau of Finance of the Interstate Commerce Commission, with the suggestion that the applications for Interstate Commerce Commission approval be dismissed for deficiencies in this circular of September 8, 1954, or that the applications be held in abeyance pending the determination of the appeals now on the Docket of the Court of Appeals for the Ninth Circuit.

May I ask that you bring this letter to the attention of Blyth & Company, Inc. and Union Securities Corporation, the underwriters.

Yours very truly,

ALEXIS I. DUP. BAYARD
Alexis I. duP. Bayard
Receiver of Western Pacific Railroad Corporation

AIduPB:DeH

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, Appellee.	No. 14515
IN RE THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	
THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,* THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14501

Memorandum of Points and Authorities in Support of Motions to Dismiss Appeals or to Affirm Judgment

This litigation is an effort by appellants to accomplish two objectives, neither of which is possible of attainment, and each of which presents a grave affront to the judicial process. By their amended bill of complaint herein the appellants seek, *first,* to realize upon a claim for an indebtedness declared worthless and ordered cancelled and discharged in the Western Pacific reorganization proceeding which terminated on March 28, 1946. By the final decree in the reorganization proceeding this claim was not only

"cancelled and discharged" but the institution of suit to recover upon it was expressly enjoined. *Second,* appellants are in effect seeking a reversal of the judgment entered against appellants by the United States District Court on January 13, 1950, in what has been termed the "tax savings" suit, (see references to this suit in amended bill of complaint, R. in No. 14515, pp. 25 et seq.). This judgment, that "plaintiffs" (appellants herein) "be denied all relief" and should "recover nothing", was affirmed by this Court on October 29, 1951, and this Court for the second time denied petitions for rehearing on August 20, 1953. Upon denial of certiorari by the Supreme Court of the United States on December 7, 1953, this judgment became final. Appellants now propose to "implement" that judgment so that, instead of providing that appellants shall "recover nothing", it will provide that appellants recover many millions of dollars out of income of Western Pacific Railroad Reorganization Trustees in satisfaction of a claim admittedly "dead". This attempted renewal of litigation is, (1), in contempt of the final decree of the bankruptcy court in the Western Pacific reorganization proceeding and, (2), upon familiar principles of *res judicata,* is precluded by the final judgment in the "tax savings" suit.*

Upon the filing of the bill of complaint herein the appellee moved for summary judgment and also filed its petition in the

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*In the course of the proceedings in the United States District Court herein, counsel for appellants was under the necessity of admitting that "the original claim as a claim in bankruptcy is dead", and further that "We" (appellants) "can't sue on the claim" (R. in Nos. 14501-14515, p. 149). Notwithstanding these admissions appellants are attempting to justify their institution of suit upon a claim admittedly "dead". In the return of respondents (appellants) to the order of the District Court to show cause why they should not be adjudged guilty of contempt it was declared, in paragraph Second, that this alleged "successoral action" was brought to "implement" a determination of this Court "in an earlier and substantially identical action" brought by appellants (R. No. 14501, pp. 37-38). If it be true that these two actions are "substantially identical" it inevitably follows that the second action is barred by the final judgment entered in the first that appellants "recover nothing".

reorganization proceeding asking that appellants be adjudged guilty of contempt. The District Court, recognizing the frivolous nature of this action (No. 14515), granted appellee's motion for summary judgment, describing the proceeding as without "the slightest merit" (R. in Nos. 14515 and 14501, p. 152) and as "an affront to the judicial process" (R. in No. 14515 and No. 14501, p. 154). The court below also concluded that this suit was in contempt of the final decree in the reorganization proceeding (R. in No. 14501, p. 43).

The appeals to this Court are from the judgment below for appellee, the order granting appellee's motion for judgment and the contempt order. Two of these orders, the order granting the summary judgment motion (R. in No. 14515, p. 77) and the order holding appellants in contempt and directing further District Court proceedings in that connection (R. in No. 14501, p. 43), are plainly interlocutory and non-appealable. The appeal from the judgment for appellee is taken, of course, from a final judgment. But since that appeal raises no substantial question, since the appeal is itself contemptuous and since appellants are using this appellate proceeding for improper purposes of vexation and harassment, appellee feels warranted in asking that the appeal be dismissed or the judgment below affirmed forthwith.

There are good reasons for a prompt disposition of this litigation. Attached to the affidavit accompanying the motions is a letter dated September 14, 1954 addressed by appellant Bayard to appellee's president, F. B. Whitman. That letter refers to appellee's refinancing program whereby its preferred stock will be called in part and exchanged in part for income bonds. Appellants hold no preferred stock of appellee and have no conceivable interest in appellee's financial structure. Nevertheless, as the Bayard letter demonstrates, appellants, *relying upon the fact that these appeals are pending,* have undertaken to criticize the exchange proposal and to call for an I.C.C. hearing—all this in the hope, no doubt, that in order to be free of their interference appellee

would make some payment to them for their worthless claims. Appellee has no such intention; but since appellants are prepared to go to these lengths of harassment and vexation appellee believes it is justified in asking this Court to bring an end to this litigation immediately.

1. The Appeal from the Judgment Below for Appellee Presents No Substantial Question.

Prior to the Western Pacific reorganization, appellant, The Western Pacific Railroad Corporation, owned all the stock of and was an unsecured creditor of the pre-reorganization The Western Pacific Railroad Company. In the reorganization proceeding this unsecured debt, together with the stock interest, was determined to be worthless, ordered cancelled and all further efforts to realize upon it enjoined.[1] After the reorganization proceeding was closed the appellant Corporation filed suit against appellee claiming $17,201,739 of so-called tax savings. This suit terminated in a final judgment that appellants take nothing.[2]

The amended complaint in the present proceeding recites the pre-reorganization indebtedness of the pre-reorganization The Western Pacific Railroad Company to the appellant Corporation (R. in No. 14515, p. 25); quotes from the opinion of the District Court in the tax savings suit (R. in No. 14515, pp. 25-34); quotes from the opinion of this Court in that action as follows (R. in No. 14515, p. 38):

> "The Corporation was the sole owner of the subsidiary's (the debtor's) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the

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[1]See *Western Pacific Railroad Company Reorganization,* 230 I.C.C. 61, 233 I.C.C. 409, 452; *In re Western Pacific R. Co.,* 34 F. Supp. 493 (N.D. Cal. 1940); *In re Western Pacific R. Co.,* 124 F.2d 136 (C.C.A. 9 1941); *Ecker v. Western Pacific R. Corp.,* 318 U.S. 448, 63 S. Ct. 692 (1943).

[2]*The Western Pacific Railroad Corporation, et al v. The Western Pacific Railroad Company,* 85 F. Supp. 868 (N.D. Cal. 1949), 197 F.2d 994, 1012 (C.A. 9 1951); 345 U.S. 247 (1953); 205 F.2d 374 and 206 F.2d 495 (C.A. 9 1953), cert. den. 346 U.S. 910.

> interests of the creditors and holders of other securities. *Consolidated Rock Products Co. v. Du Bois* (312 U.S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its cooperation then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

leaps to the conclusion that by this language this Court has held that appellee holds $17,201,739 in trust for appellant and other pre-reorganization unsecured creditors (R. in No. 14515, pp. 38, 41); and asks that the court take custody of this fund and distribute it to appellant and the other unpaid creditors of the pre-reorganization company (R. in No. 14515, p. 43).

This is preposterous. The opinion of this Court on which appellants rely did not even intimate that appellee holds $17,201,739 in trust for appellants or anyone else. On the contrary, this Court ruled in unequivocal fashion that appellants had no claim against appellee and affirmed the judgment below that appellants take nothing (197 F.2d 994; 206 F.2d 495). In that tax savings suit the appellants applied to the court to have the so-called "tax savings" treated as a fund held by appellee for appellants' benefit, but this application was not granted. No such "fund" was recognized as having any existence, and by the court's final judgment appellants were denied all relief. Appellants are now engaged, therefore, in asking the Court to rule that its decision for appellee in the earlier proceeding was in truth a decision for appellants. Appellee submits that this is a frivolous undertaking.

Appellants represent that their complaint herein has been filed "as an independent or successoral action in equity" to provide a "machinery or medium" for "implementing" the judgment in the tax savings suit (R. in No. 14515, p. 41). But the judgment in the tax savings suit, affirmed without any change whatever by this Court, was that the appellants recover nothing, and yet appellants pro-

pose to "implement" that judgment by converting it into a judgment that appellants should now recover $17,201,739.

The reasons why the judgment below is plainly correct and this appeal, like the entire proceeding, plainly frivolous include the following:

(a) The only right appellants assert is the alleged right of the appellant Corporation as an unpaid unsecured creditor of the debtor Company in the Western Pacific reorganization proceeding (R. in No. 14515, pp. 39, 42). It is indisputable that the claim of the Corporation as creditor of the debtor in that proceeding was found valueless, cancelled and discharged. The Interstate Commerce Commission said (233 I.C.C. 452):

> "The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims."
>
> * * * * * * *
>
> "The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be canceled." (233 I.C.C. 453)

The District Court, approving the I.C.C. plan, said (34 F. Supp. 498):

> "The unsecured claims of the Western Pacific Railroad Corporation and the Western Pacific Company, and other unsecured claims not entitled to priority over existing mortgage, are found by the Commission to be without value and not entitled to participate in the distribution of cash or securities of the reorganized company."

The Supreme Court, affirming the District Court order approving the plan, said (318 U.S. 488):

> "* * * The secured claim of A. C. James Company could not be satisfied in full even with the more liberal valuation

of the common stock. Claims of lesser dignity were eliminated."

The order of November 7, 1944 revesting the railroad properties in the reorganized company provides in part:

"and said Railroad Company shall assume only the valid and outstanding obligations and liability of the debtor or the debtor's trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged." (R. in No. 12,506, p. 50)[3]

The final order in the reorganization proceeding, dated March 28, 1946, provides in part:

"and the Western Pacific Railroad Company is released and discharged forever from all debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented or allowed in these proceedings, and said Reorganized Company is free and clear of all rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order." (R. in No. 12,506, p. 2014).

The appellant Corporation was a party to the reorganization proceeding and the orders in that proceeding cancelling the debt upon which appellants now seek to rely have, of course, long since become final. On the most elementary principles of res judicata appellants cannot now re-assert this cancelled debt.[4]

(b) Even if it were appropriate, which it is not, to modify the reorganization decrees in order to revive and reactivate the pre-reorganization debt to appellant Corporation, neither

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[3]The text of this order and of the final order in the reorganization proceeding appears in the record of this Court in case No. 12,506. The Court takes judicial notice of this record. *Latta v. Western Investment Co.,* 173 F.2d 99, 103 (C.A. 9 1949) cert. den. 337 U.S. 940.

[4]*New York v. Irving Trust Co.,* 288 U..S 329 (1933); *Stoll v. Gottlieb,* 305 U.S. 165 (1938); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940).

this Court nor the court below sitting in equity would have jurisdiction to do so. The Bankruptcy Court has exclusive jurisdiction over its decrees.[5]

(c) The effort by appellants to found a claim on the action of this Court in the tax saving litigation is patently frivolous. This Court held in unequivocal fashion that the appellants had no claim.[6]

(d) The judgment in the tax saving litigation that appellants take nothing from appellee is final and on principles of res judicata forecloses this new attempt to recover the same $17,201,739 which appellants claimed in the tax saving case.[7]

(e) The Western Pacific reorganization began in 1935. All pre-reorganization claims against the pre-reorganization The Western Pacific Railroad Company are obviously long since barred by the statute of limitations.[8]

An appeal which presents no substantial question will be dismissed[9] or the judgment below forthwith affirmed.[10] This pro-

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[5]"There is no power in the district court sitting in an independent proceeding in equity to alter, modify or amend bankruptcy orders." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 206 F.2d 495, 499 (C.A. 9 1953)

[6]*Western Pacific R. Corp. v. Western Pacific R. Co.,* 197 F.2d 994, 206 F.2d 495 (C.A. 9 1953).

[7]*Cromwell v. County of Sac,* 94 U.S. 351 (1877); *Northern Pacific Railroad Co. v. Slaght,* 205 U.S. 122 (1907); *Hatchitt v. United States,* 158 F.2d 754 (C.A. 9 1946); *Williamson v. Columbia Gas and Electric Corporation,* 186 F.2d 464 (C.A. 3 1950) cert. den. 341 U.S. 921; *Wilson Cypress Co. v. Atlantic Coastline R. Co.,* 109 F.2d 623 (C.A. 5 1940) cert. den. 310 U.S. 653; *Miller v. National City Bank of New York,* 166 F.2d 723 (C.A. 2 1948).

[8]*California Code of Civil Procedure,* Secs. 337, 339 and 343.

[9]*In re Midland United Co.,* 141 F.2d 692 (C.C.A. 3 1944); *McMillan v. Taylor,* 160 F.2d 217 (D.C. App. 1946); *Wright v. Central National Bank,* 37 F.2d 234 (C.C.A. 10 1929) cert. den. 281 U.S. 755; *Robertson v. Wilkinson,* 10 F.2d 311 (C.C.A. 5 1926); *Dakin v. United States,* 105 F.2d 150 (C.C.A. 4 1939).

[10]*Collins v. Wayland,* 139 F.2d 677 (C.C.A. 9 1944); *Brown v. Carver,* 45 F.2d 673 (C.C.A. 2 1930); *National Surety Company v. Universal Transportation Co.,* 256 Fed. 450 (C.C.A. 2 1919).

cedure is especially appropriate where, as here, a litigant seeks reconsideration of issues already finally decided against him.[11]

2. This Appellate Proceeding Is Contemptuous.

Appellants seek to realize upon an unsecured debt owing from the pre-reorganization The Western Pacific Railroad Company to the appellant Corporation. This debt was determined worthless, cancelled and discharged in the reorganization proceeding and further efforts to realize upon it were enjoined by the final order of the reorganization court, dated March 28, 1946, which said in part:

> "6. All persons * * * are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company * * * on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * *" (R. in No. 12,506, p. 2017)

The court below correctly held that the effort now made to realize on the old debt was a contempt of this order. Appellants continue this effort in this Court and accordingly this appellate proceeding is also in contempt of the reorganization decree. Appellee does not believe this Court should entertain a contemptuous proceeding and on that ground asks that these appeals be dismissed.

3. The Appeal from the Order Granting the Motion for Summary Judgment Should Be Dismissed.

Appellants have appealed from the order of the District Court, dated June 28, 1944, granting appellee's motion for summary

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[11] *Sancho v. Acevedo,* 93 F.2d 331 (C.C.A. 1 1937); *Waddell v. Chicago Land Clearance Commission,* 206 F.2d 748 (C.A. 7 1953).

judgment and denying a similar motion by appellants. This order is interlocutory and non-appealable.[12]

4. The Appeal (No. 14501), from the Order of the District Court Finding Appellants in Contempt of Court and Directing Further District Court Proceedings Should Be Dismissed.

Appellants have appealed (No. 14501) from the June 28, 1954 order of the District Court holding appellants in contempt of the final decree of the reorganization proceeding and directing that further proceedings be held in the District Court to fix the damages suffered by appellee on account of the contempt (R. in No. 14501, pp. 43-45). The proceeding to fix damages has not yet been held. Nevertheless appellants have undertaken to appeal from the contempt order. It is clear that the June 28, 1954 order contemplating, as it does, further proceedings in the District Court is interlocutory in nature and not appealable.[13]

Dated: October 5, 1954.

Respectfully submitted,

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN
Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel

---

[12]*Cashion v. Bunn,* 149 F.2d 969 (C.C.A. 9 1945); *United States v. Arizona,* 206 F.2d 159 (C.A. 9 1953); *Morgenstern Chemical Co. v. Schering Corp.,* 181 F.2d 160 (C.A. 3 1950); *John Hancock Mutual Life Ins. Co. v. Kraft,* 200 F.2d 952 (C.A. 2 1953).

[13]*International Silver Co. v. Oneida Community,* 93 F.2d 437, 439 (C.C.A. 2 1937); *Dainese v. Kendall,* 119 U.S. 53 (1896); *McGourkey v. Toledo and Ohio Ry.,* 146 U.S. 536 (1892).

No. 14501

In the

United States Court of Appeals

For the Ninth Circuit

IN RE THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,

Appellants,

THE WESTERN PACIFIC RAILROAD COMPANY,

Appellee.

Notice of Motion to Dismiss the Appeal

To appellants, The Western Pacific Railroad Corporation and Alexis I. duPont Bayard, Receiver, and to Leroy R. Goodrich, Esq., their attorney:

PLEASE TAKE NOTICE that The Western Pacific Railroad Company, the appellee herein, will present to the above entitled court its motion hereinafter set forth to dismiss the appeal herein on Monday, October 18, 1954, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, in the courtroom of the above

entitled court in the United States Post Office and Court House Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN

Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Of Counsel

No. 14501

In the

United States Court of Appeals

For the Ninth Circuit

IN RE THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,

Appellants,

THE WESTERN PACIFIC RAILROAD COMPANY,

Appellee.

Motion to Dismiss the Appeal

Comes now appellee and moves to dismiss the appeal from the order of the District Court holding appellants in contempt of court and authorizing further District Court proceedings for fixing damages on the ground that:

(a) The order appealed from is an interlocutory non-appealable order.

This motion is based upon the record now on file in this Court and on the foregoing memorandum of points and authorities filed

in support of the motion to dismiss the appeals or affirm the judgment in No. 14515 and in support of this motion.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN
Attorneys for Appellee

MCCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel

No. 14515

United States
Court of Appeals
for the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,

Appellants.

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 90)

Appeals from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-24-54

No. 14515

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WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LEROY R. GOODRICH, ESQ.,
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FRANK C. NICODEMUS, JR.,
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New York 4, N. Y.;

WILLIAM MARVEL,
Delaware Trust Bldg.,
Wilmington, Delaware,

Attorneys for Plaintiffs and Appellants.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITH & GREENE,
351 California Street,
San Francisco, Calif.,

Attorneys for Defendants and Appellees.

In the District Court of the United States for the Northern District of California, Southern Division

Civil Action No. 33514

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver,

Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants.

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division:

The Bill of Complaint (hereinafter referred to as the complaint) of Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully shows:

First: Western Pacific Railroad Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and Alexis I. du Pont Bayard is Receiver of Western Pacific Railroad Corporation duly appointed by the Chancery Court of the State of Delaware in and for the County of New Castle (hereinafter referred to as the plaintiffs); and both of said plaintiffs are citizens and residents of the State of Delaware.

Second: The Western Pacific Railroad Company was the original petitioner in the reorganization proceedings under Section 77 of the Bankruptcy Act numbered 26591-S on the docket of this Court, the history of which, so far as material to this complaint and except as amplified herein, is judicially stated and found by the Honorable Louis E. Goodman, United States District Judge, in a certain action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508—Civil," to be as follows:

"Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the 'debtor'; defendant, the reorganized subsidiary is The Western Pacific Railroad Company.

"Statement of Facts

"Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission, 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value

and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court (318 U. S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor (318 U. S. 508, 509).[1] Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things. the plain-

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"[1]See in re Denver & R. G. W. R. Co. 10 Cir. 150 Fed. 2d 28 and R. F. C. v. D. & R. G. R. Co. 328 U. S. 495, where similar holdings upon similar contentions were made.

tiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative[2] attempt to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

"During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was $4,144,828. Later in 1943, after the filing of the 1942 return and payment of

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"[2]Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944).

the tax, the tax attorneys for defendant 'discovered' Section 123 of the Revenue Act of 1942 (26 USC 23(g)4).[3] They proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some $75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this $75,000,000 loss in 1943, could be 'carried back' to 1942 (sec. 122(b)(1) of the Internal Revenue Code) and part could be 'carried over' to 1944 (Sec. 122(b)(2) of the Internal Revenue Code).

"Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some $17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the $75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show

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"[3]'Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset.' (Subsection 4 of Sec. 23g.) By this subsection, losses resulting from worthlessness of stock of an affiliated became operating losses instead of capital losses as theretofore.

no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

"Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.[4]

"On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain

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"[4]The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commission or Court.

stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

"On December 17, 1947, plaintiff filed a supplemental bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated return for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control.'

"In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some $17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

"After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

"The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

"A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

"But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

"Discussion

"The income tax picture presented is bizarre indeed. It is 'paradoxical,' as the defendant's tax attorneys put it.[5] The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of $21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization

"[5]In a letter dated May 20, 1943 (plff. Ex. 50), addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: 'This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.' (Interlineation supplied.)

Court to be valueless. But the tax attorneys for the defendant conceived a 'paradoxical' plan. They decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder[6] affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942 (26 USC Sec. 23(g)4).[7] Thus, part of the lost $75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the $21,346,567 tax would be paid.

"This was more than mere tax 'saving'; it amounted to a complete tax 'escape.' But the debtor had already paid $4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of 'carry-back,' part of the $75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or 'escape' offered for the three years in question, the claim for refund was waived and the Commissioner then

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"[6]Sec. 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

"[7]See footnote # 3.

accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that the debtor paid $4,144,828 taxes to the United States in order to escape the $21,346,567 previously mentioned, or a net saving or 'escape' of $17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (Sec. 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid $4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.[8]

"How the amendment to the statute, Sec. 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

"Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These

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"[8]It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns."

limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses, 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938."

Third: As the result of the various steps outlined in the foregoing quoted part of the opinion of the District Court, which was formally adopted by the District Court as its Findings of Fact, a net fund amounting to $17,201,739 is in the possession of the Western Pacific Railroad Company, having been transferred to it by Thomas M. Schumacher and Sidney Ehrman, Trustees, subject to an Assumption Agreement whereby it assumed:

"Generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's property by the said Trustees, or their conduct of the debtor's business."

Fourth: The Plan of Reorganization of the debtor

referred to in the opinion quoted above was certified to the District Court by the Interstate Commerce Commission June 21, 1939, and was approved by the District Court August 15, 1940, at a time when a loss resulting from the worthlessness of securities owned by a holding corporation, in which category petitioner Western Pacific Railroad Corporation belongs, could be offset only against capital gains occurring in the same tax period, but on October 21, 1942, Congress inserted in the following provision of the Internal Revenue Code forming part of Section 23 the paragraph thereof numbered (g)(4):

"Deductions from gross income. In computing net income there shall be allowed as deductions:

"* * *

"(g)(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange on the last day of such taxable year of capital assets.

"* * *

"(4) Stock in affiliated corporations. For the purpose of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purpose of this paragraph a corporation shall be deemed affiliated only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and * * *"

Fifth: The enactment of the foregoing Section 23(g)(2)(4) on October 21, 1942, authorizing restoration out of consolidated taxable income of the lost capital of the parent invested in the securities of a subsidiary could not have been reasonably anticipated or foreseen by the Interstate Commerce Commission on June 21, 1939, when it certified the Plan of Reorganization to this Court, and on October 10, 1946, the plaintiffs Western Pacific Railroad Corporation filed in this Court the suit hereinbefore referred to (in which suit at a subsequent stage Alexis I. du Pont Bayard was added as an additional plaintiff) against Western Pacific Railroad Company, the debtor in the Bankruptcy proceedings 26591-S and the obligor under the Assumption Agreement hereinbefore mentioned, and also against the additional parties named in the subjointed footnote as defendants,* praying an accounting by the reorganized Western Pacific Railroad Company in respect of the use under federal consolidated income and excess profits tax returns of the plaintiffs' tax credit in the amount necessary to effect a relinquishment of its taxable income up to $17,201,739 under Section 23(g)(2) and (4) set out above. The subsequent history of this accounting proceeding and the antecedent history of Section 77 proceeding for the reorganization of the debtor

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*The Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company, and Delta Finance Company, Ltd.

Railroad Company are within the judicial knowledge of this Court, as revealed by the official reports in chronological order cited below.*

Sixth: Under the Internal Revenue Code and the Regulations of the Treasury of the United States thereunder, the plaintiff Western Pacific Railroad Corporation was free to join or refuse to join in consolidated returns as it saw fit, and was under no statutory duty to file consolidated returns and was free to make its own decision whether to file or not to file on the basis of its own interests.** But the Court of Appeals held (Judge Fee dissenting) in response to repeated assertions of the defendant Railroad Company that it had not paid its pre-reorganization debts and that the plaintiff Western Pacific Railroad Corporation was under an equit-

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*Western Pacific Railroad Company Reorganization, 230 I.C.C. 61; 233 I.C.C. 409; in re Western Pacific Railroad Company, No. 26591-S, 34 F. Supp. 493; Western Pacific Railroad Company vs. Reconstruction Finance Corporation, et al., and four other cases, No. 9712, 124 Fed. 2d 136 (1941); Ecker and others vs. Western Pacific Railroad Corporation, et al., 318 U. S. 418 (1943); Western Pacific Railroad Corporation vs. Western Pacific Railway Company, et al., No. 26508, 85 F. Supp. 869 (1949); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 197 Fed. 2d 994 (1951); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 345 U. S. 247 (1953); and after remand 205 Fed. 2d 374, 206 Fed. 2d 495.

**Treasury Regulation 109, Sec. 23—16a and 11a —Duke Power Company v. Commission, 44 Fed. 2d 543, 545 (4 Circuit).

able duty as fiduciary to join in consolidated returns and thereby donate its tax credit and the avails thereof to the reorganized defendant Railroad Company because its creditors had not been fully paid. The following is from the prevailing opinion written by Judge Byrne:

"The Corporation was the sole owner of the subsidiary's (the debtor's) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Products Co. v. Du Bois (312 U. S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

The plaintiffs are bound by and accept this determination of the Court of Appeals, and their purpose and objective in filing this successoral complaint is to provide the essential machinery or medium for implementing it and requiring the reorganized Western Pacific Railroad Company, as in duty bound under its Assumption Agreement as the trustee-custodian of the fund also to accept it and to carry it into effect.

Seventh: The doctrine of Consolidated Rock Products Company vs. Du Bois (312 U. S. 510) is that junior interests in a bankruptcy or equity administration proceeding cannot be given any part

or securities representing any part of the debtor's estate unless and until full compensatory treatment is given for the entire bundle of rights which the senior creditors surrender. In the proceeding 26591-S, the Plan of Reorganization approved by this Court and by the Supreme Court of the United States allotted to the senior creditors, in full satisfaction of their claims, securities representing in the determination of the Interstate Commerce Commission and of the Court the full value of their claims without resorting to an excess value of the senior liens which they surrendered; and thereupon gave a residue valued at $5,964,296 to creditors secured by liens wholly subordinate to the liens held by the senior creditors. It is accordingly res adjudicata in the proceeding 26591-S that any fiduciary duty of the plaintiffs Western Pacific Railroad Corporation to donate its special tax credit, or taxes remitted there against, under Section 23(g)(2)(4) is one to be exercised for the exclusive benefit of the creditors of the debtor Western Pacific Railroad Company left unprovided for or inadequately provided for under the Plan of Reorganization approved by the Supreme Court of the United States in Ecker vs. Western Pacific Railroad Corporation, 318 U. S. 448.

Eighth: In the exercise of its jurisdiction in the proceedings 26591-S, the Interstate Commerce Commission determined the amount of the indebtedness of the debtor as of January 1, 1939, for which full compensatory treatment was not accorded under the

Plan of Reorganization to be $13,914,530, of which $6,249,750 was due and owing to the A. C. James Company; $7,609,370 was due and owing to the plaintiff Western Pacific Railroad Corporation, and $60,410 was due and owing to Western Realty Company. The claim of the A. C. James Company was liquidated in part out of collateral pledged by the debtor (junior lien bonds of the debtor or new securities issued thereagainst and substituted therefor) and the unliquidated balance as shown by an exhibit introduced by the defendant Railroad Company in said action "No. 26508 Civil" is $3,495,000 but is subject to adjustment bringing it up to $3,683,175.* In addition to the creditor claims so determined and allowed by the Interstate Commerce Commission the claim of plaintiff Western Pacific Railroad Corporation as owner of all of the debtor's preferred stock was allowed in the amount in excess of $40,000,000.**

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*In the exhibit introduced by the defendant Railroad Company to establish the deficiency of the A. C. James Company, it was charged with 37,635 shares of new common stock at $62 instead of its true currency value of $57 as fixed by the treatment accorded the senior lien creditors—exhibit (defendant's) No. 33, record page 2022.

**A secured claim of Railroad Credit Corporation was fully liquidated by the use of common stock pledged at $62 per share and certain Accommodation Collateral supplied by Western Pacific Railroad Corporation, the unused balance of which Accommodation Collateral was restored to Western Pacific Railroad Corporation under a decree of the Chancery Court of the State of Maryland.

Ninth: As hereinbefore alleged the plaintiffs are filing this complaint as an independent or successoral action in equity to provide an essential machinery or medium for implementing the decree or judgment in said action "No. 26508 Civil" and for an administration of the trust arising thereunder or in consequence thereof and as a civil action in equity between citizens of different states, viz., the plaintiffs Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, both being citizens and residents of the State of Delaware and Western Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, as a defendant, wherein the amount in controversy greatly exceeds $5,000.00.

Tenth: James Foundation of New York, Inc., successor to the creditor position of A. C. James Company, is a corporation of the State of New York; and Western Realty Company is a corporation of the State of Colorado, and each being an unsatisfied creditor of the debtor, and as such a beneficiary of the trust created as hereinbefore alleged, is an interested but not an indispensible party to this proceeding, and being such both also have been named as parties defendant herein.

Eleventh: The reason why this complaint was not filed at a earlier date is that the status of the $17,201,739 fund in the custody of the reorganized Western Pacific Railroad Company, defendant herein, was not finally established until the denial of the second petition for certiorari at the present

term of the United States Supreme Court in said action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Rr. Co., et al., No. 26508-Civil."

Twelfth: While said second petition for certiorari was pending in the United States Supreme Court on application for rehearing, the plaintiff receiver wrote the President of the defendant Railroad Company as follows:

"If the Supreme Court denies our pending petition for a rehearing of the application for certiorari and establishes the position taken by your counsel throughout the litigation that the $17,000,000 fund in your custody is a trust fund for the satisfaction of the unpaid creditors of your company (pre-reorganization) it is our purpose to apply to the Bankruptcy Court for a proper application of the fund to that purpose. I am writing this in advance to put you and your directors on notice of our position."

No reply to or acknowledgment of said communication has been received by the plaintiffs but they are informed and allege that the defendant Railroad Company proposes to divert the fund to purposes other than the payment and satisfaction of claims of partially paid and wholly unpaid (pre-reorganization) creditors of the defendant Railroad Company and to utilize it for the enrichment of the creditors, and successors in interest of creditors that received full compensatory treatment under the Plan of Reorganization.

Wherefore, the plaintiffs pray:

(1) That this Court make cognizance of this cause and grant unto them a writ of subpoena of the United States directed to Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, named as defendants herein, service upon the two defendants last named to be made by the Marshal of the District wherein personal service may be effected;

(2) That this Court grant unto the plaintiff a judgment or decretal order adjudging that the fund of $17,201,739 in the possession of the reorganized Western Pacific Railroad Company is held by it subject to the Assumption Agreement executed by it pursuant to the order and decree of this Court in the proceeding 26591-S in the order of their respective priorities and for the interests junior thereto as heretofore determined by the Interstate Commerce Commission;

(3) That this Court enter a preliminary order placing said fund of $17,201,739 in judicial custody and requiring and directing the defendant Western Pacific Railroad Company to hold said fund subject to the further order or orders of this Court which may include an order or orders providing therefrom currently for the expenses of the plaintiffs and their attorney and counsel in resisting the threatened conversion thereof; and

(4) That the plaintiffs may have such further relief by way of declaratory judgment or decree of

injunction, temporary or permanent, or both, or otherwise as to the Court may seem meet.

Dated April 21, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, RECEIVER,

Plaintiffs;

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed April 22, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

Civil Action No. 33514

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver,

Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants.

AMENDED BILL OF COMPLAINT

To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division:

The Amended Bill of Complaint (hereinafter referred to as the complaint) of Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully shows:

First: Western Pacific Railroad Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and Alexis I. du Pont Bayard is Receiver of Western Pacific Railroad Corporation duly appointed by the Chancery Court of the State of Delaware in and for the County of New Castle (hereinafter referred to as the plaintiffs); and both of said plaintiffs are citizens and residents of the State of Delaware.

Second: The Western Pacific Railroad Company was the original petitioner in the reorganization proceedings under Section 77 of the Bankruptcy Act numbered 26591-S on the docket of this Court, the history of which, so far as material to this complaint and except as amplified herein, is judicially stated and found by the Honorable Louis E. Goodman, United States District Judge, in a certain action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508—Civil," to be as follows:

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"Statement of Facts

"Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission, 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value

and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court (318 U. S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor (318 U. S. 508, 509).[1] Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plain-

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"[1]See in re Denver & R. G. W. R. Co. 10 Cir. 150 Fed. 2d 28 and R. F. C. v. D. & R. G. R. Co. 328 U. S. 495, where similar holdings upon similar contentions were made.

tiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative[2] attempt to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

"During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was $4,144,828. Later in 1943, after the filing of the 1942 return and payment of

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"[2]Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944).

the tax, the tax attorneys for defendant 'discovered' Section 123 of the Revenue Act of 1942 (26 USC 23(g)4).[3] They proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some $75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this $75,000,000 loss in 1943, could be 'carried back' to 1942 (sec. 122(b)(1) of the Internal Revenue Code) and part could be 'carried over' to 1944 (Sec. 122(b)(2) of the Internal Revenue Code).

"Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some $17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the $75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show

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"[3] 'Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset.' (Subsection 4 of Sec. 23g.) By this subsection, losses resulting from worthlessness of stock of an affiliated became operating losses instead of capital losses as theretofore.

no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

"Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.[4]

"On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain

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"[4]The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commission or Court.

stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

"On December 17, 1947, plaintiff filed a supplemental bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated return for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control.'

"In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some $17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

"After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

"The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

"A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

"But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

"Discussion

"The income tax picture presented is bizarre indeed. It is 'paradoxical,' as the defendant's tax attorneys put it.[5] The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of $21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization

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"[5]In a letter dated May 20, 1943 (plff. Ex. 50), addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: 'This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.' (Interlineation supplied.)

Court to be valueless. But the tax attorneys for the defendant conceived a 'paradoxical' plan. They decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder[6] affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942 (26 USC Sec. 23(g)4).[7] Thus, part of the lost $75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the $21,346,567 tax would be paid.

"This was more than mere tax 'saving'; it amounted to a complete tax 'escape.' But the debtor had already paid $4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of 'carry-back,' part of the $75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or 'escape' offered for the three years in question, the claim for refund was waived and the Commissioner then

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"[6]Sec. 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

"[7]See footnote # 3.

accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that the debtor paid $4,144,828 taxes to the United States in order to escape the $21,346,567 previously mentioned, or a net saving or 'escape' of $17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (Sec. 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid $4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.[8]

"How the amendment to the statute, Sec. 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

"Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These

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"[8]It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns."

limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses, 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938."

Third: As the result of the various steps outlined in the foregoing quoted part of the opinion of the District Court, which was formally adopted by the District Court as its Findings of Fact, a net fund amounting to $17,201,739 is in the possession of the Western Pacific Railroad Company, having been transferred to it by Thomas M. Schumacher and Sidney Ehrman, Trustees, subject to an Assumption Agreement whereby it assumed:

"Generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's property by the said Trustees, or their conduct of the debtor's business."

Fourth: The Plan of Reorganization of the debtor

referred to in the opinion quoted above was certified to the District Court by the Interstate Commerce Commission June 21, 1939, and was approved by the District Court August 15, 1940, at a time when a loss resulting from the worthlessness of securities owned by a holding corporation, in which category petitioner Western Pacific Railroad Corporation belongs, could be offset only against capital gains occurring in the same tax period, but on October 21, 1942, Congress inserted in the following provision of the Internal Revenue Code forming part of Section 23 the paragraph thereof numbered (g)(4):

"Deductions from gross income. In computing net income there shall be allowed as deductions:

"* * *

"(g)(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange on the last day of such taxable year of capital assets.

"* * *

"(4) Stock in affiliated corporations. For the purpose of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purpose of this paragraph a corporation shall be deemed affiliated only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and * * *"

Fifth: The enactment of the foregoing Section 23(g)(2)(4) on October 21, 1942, authorizing restoration out of consolidated taxable income of the lost capital of the parent invested in the securities of a subsidiary could not have been reasonably anticipated or foreseen by the Interstate Commerce Commission on June 21, 1939, when it certified the Plan of Reorganization to this Court, and on October 10, 1946, the plaintiffs Western Pacific Railroad Corporation filed in this Court the suit hereinbefore referred to (in which suit at a subsequent stage Alexis I. du Pont Bayard was added as an additional plaintiff) against Western Pacific Railroad Company, the debtor in the Bankruptcy proceedings 26591-S and the obligor under the Assumption Agreement hereinbefore mentioned, and also against the additional parties named in the subjointed footnote as defendants,* praying an accounting by the reorganized Western Pacific Railroad Company in respect of the use under federal consolidated income and excess profits tax returns of the plaintiffs' tax credit in the amount necessary to effect a relinquishment of its taxable income up to $17,201,739 under Section 23(g)(2) and (4) set out above. The subsequent history of this accounting proceeding and the antecedent history of Section 77 proceeding for the reorganization of the debtor

*The Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company, and Delta Finance Company, Ltd.

Railroad Company are within the judicial knowledge of this Court, as revealed by the official reports in chronological order cited below.*

Sixth: Under the Internal Revenue Code and the Regulations of the Treasury of the United States thereunder, the plaintiff Western Pacific Railroad Corporation was free to join or refuse to join in consolidated returns as it saw fit, and was under no statutory duty to file consolidated returns and was free to make its own decision whether to file or not to file on the basis of its own interests.** But the Court of Appeals held (Judge Fee dissenting) in response to repeated assertions of the defendant Railroad Company that it had not paid its pre-reorganization debts and that the plaintiff Western Pacific Railroad Corporation was under an equit-

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*Western Pacific Railroad Company Reorganization, 230 I.C.C. 61; 233 I.C.C. 409; in re Western Pacific Railroad Company, No. 26591-S, 34 F. Supp. 493; Western Pacific Railroad Company vs. Reconstruction Finance Corporation, et al., and four other cases, No. 9712, 124 Fed. 2d 136 (1941); Ecker and others vs. Western Pacific Railroad Corporation, et al., 318 U. S. 418 (1943); Western Pacific Railroad Corporation vs. Western Pacific Railway Company, et al., No. 26508, 85 F. Supp. 869 (1949); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 197 Fed. 2d 994 (1951); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 345 U. S. 247 (1953); and after remand 205 Fed. 2d 374, 206 Fed. 2d 495.

**Treasury Regulation 109, Sec. 23—16a and 11a —Duke Power Company v. Commission, 44 Fed. 2d 543, 545 (4 Circuit).

able duty as fiduciary to join in consolidated returns and thereby donate its tax credit and the avails thereof to the reorganized defendant Railroad Company because its creditors had not been fully paid. The following is from the prevailing opinion written by Judge Byrne:

"The Corporation was the sole owner of the subsidiary's (the debtor's) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Products Co. v. Du Bois (312 U. S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

The plaintiffs are bound by and accept this determination of the Court of Appeals, and their purpose and objective in filing this successoral complaint is to provide the essential machinery or medium for implementing it and requiring the reorganized Western Pacific Railroad Company, as in duty bound under its Assumption Agreement as the trustee-custodian of the fund also to accept it and to carry it into effect.

Seventh: The doctrine of Consolidated Rock Products Company vs. Du Bois (312 U. S. 510) is that junior interests in a bankruptcy or equity administration proceeding cannot be given any part

or securities representing any part of the debtor's estate unless and until full compensatory treatment is given for the entire bundle of rights which the senior creditors surrender. In the proceeding 26591-S, the Plan of Reorganization approved by this Court and by the Supreme Court of the United States allotted to the senior creditors, in full satisfaction of their claims, securities representing in the determination of the Interstate Commerce Commission and of the Court the full value of their claims without resorting to an excess value of the senior liens which they surrendered; and thereupon gave a residue valued at $5,964,296 to creditors secured by liens wholly subordinate to the liens held by the senior creditors. It is accordingly res adjudicata in the proceeding 26591-S that any fiduciary duty of the plaintiffs Western Pacific Railroad Corporation to donate its special tax credit, or taxes remitted there against, under Section 23(g)(2)(4) is one to be exercised for the exclusive benefit of the creditors of the debtor Western Pacific Railroad Company left unprovided for or inadequately provided for under the Plan of Reorganization approved by the Supreme Court of the United States in Ecker vs. Western Pacific Railroad Corporation, 318 U. S. 448.

Eighth: In the exercise of its jurisdiction in the proceedings 26591-S, the Interstate Commerce Commission determined the amount of the indebtedness of the debtor as of January 1, 1939, for which full compensatory treatment was not accorded under the

Plan of Reorganization to be $13,914,530, of which $6,249,750 was due and owing to the A. C. James Company; $7,609,370 was due and owing to the plaintiff Western Pacific Railroad Corporation, and $60,410 was due and owing to Western Realty Company. The claim of the A. C. James Company was liquidated in part out of collateral pledged by the debtor (junior lien bonds of the debtor or new securities issued thereagainst and substituted therefor) and the unliquidated balance as shown by an exhibit introduced by the defendant Railroad Company in said action "No. 26508 Civil" is $3,495,000 but is subject to adjustment bringing it up to $3,683,175.* In addition to the creditor claims so determined and allowed by the Interstate Commerce Commission the claim of plaintiff Western Pacific Railroad Corporation as owner of all of the debtor's preferred stock was allowed in the amount in excess of $40,000,000.**

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*In the exhibit introduced by the defendant Railroad Company to establish the deficiency of the A. C. James Company, it was charged with 37,635 shares of new common stock at $62 instead of its true currency value of $57 as fixed by the treatment accorded the senior lien creditors—exhibit (defendant's) No. 33, record page 2022.

**A secured claim of Railroad Credit Corporation was fully liquidated by the use of common stock pledged at $62 per share and certain Accommodation Collateral supplied by Western Pacific Railroad Corporation, the unused balance of which Accommodation Collateral was restored to Western Pacific Railroad Corporation under a decree of the Chancery Court of the State of Maryland.

Ninth: As hereinbefore alleged the plaintiffs are filing this complaint as an independent or successoral action in equity to provide an essential machinery or medium for implementing the decree or judgment in said action "No. 26508 Civil" and for an administration of the trust arising thereunder or in consequence thereof and as a civil action in equity between citizens of different states, viz., the plaintiffs Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, both being citizens and residents of the State of Delaware and Western Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, as a defendant, wherein the amount in controversy greatly exceeds $5,000.00.

Tenth: James Foundation of New York, Inc., successor to the creditor position of A. C. James Company, is a corporation of the State of New York; and Western Realty Company is a corporation of the State of Colorado, and each being an unsatisfied creditor of the debtor, and as such a beneficiary of the trust created as hereinbefore alleged, is an interested but not an indispensible party to this proceeding, and being such both also have been named as parties defendant herein.

Eleventh: The reason why this complaint was not filed at a earlier date is that the status of the $17,201,739 fund in the custody of the reorganized Western Pacific Railroad Company, defendant herein, was not finally established until the denial of the second petition for certiorari at the present

term of the United States Supreme Court in said action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Rr. Co., et al., No. 26508-Civil."

Twelfth: While said second petition for certiorari was pending in the United States Supreme Court on application for rehearing, the plaintiff receiver wrote the President of the defendant Railroad Company as follows:

"If the Supreme Court denies our pending petition for a rehearing of the application for certiorari and establishes the position taken by your counsel throughout the litigation that the $17,000,000 fund in your custody is a trust fund for the satisfaction of the unpaid creditors of your company (pre-reorganization) it is our purpose to apply to the Bankruptcy Court for a proper application of the fund to that purpose. I am writing this in advance to put you and your directors on notice of our position."

No reply to or acknowledgment of said communication has been received by the plaintiffs but they are informed and allege that the defendant Railroad Company proposes to divert the fund to purposes other than the payment and satisfaction of claims of partially paid and wholly unpaid (pre-reorganization) creditors of the defendant Railroad Company and to utilize it for the enrichment of the creditors, and successors in interest of creditors that received full compensatory treatment under the Plan of Reorganization.

Wherefore, the plaintiffs pray:

(1) That this Court make cognizance of this cause and grant unto them a writ of subpoena of the United States directed to Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, named as defendants herein, service upon the two defendants last named to be made by the Marshal of the District wherein personal service may be effected;

(2) That this Court grant unto the plaintiff a judgment or decretal order adjudging that the fund of $17,201,739 in the possession of the reorganized Western Pacific Railroad Company is held by it subject to the Assumption Agreement executed by it pursuant to the order and decree of this Court in the proceeding 26591-S, and is held by it in trust for the benefit of the unpaid and unsatisfied creditors of the debtor in said proceeding 26591-S in order of their respective priorities and for the interests junior thereto as heretofore determined by the Interstate Commerce Commission;

(3) That this Court enter a preliminary order placing said fund of $17,201,739 in judicial custody and requiring and directing the defendant Western Pacific Railroad Company to hold said fund subject to the further order or orders of this Court which may include an order or orders providing therefrom currently for the expenses of the plaintiffs and their attorney and counsel in resisting the threatened conversion thereof; and

(4) That the plaintiffs may have such further relief by way of declaratory judgment or decree of injunction, temporary or permanent, or both, or otherwise as to the Court may seem meet.

Dated: May 4, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, RECEIVER,

Plaintiffs;

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,
Counsel.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To plaintiffs and to their attorney, Leroy R. Goodrich, Esquire:

You will please take notice that on Monday, May 31, 1954, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the above-entitled Court, in the Post Office Building, Seventh and Mission Streets, San Francisco, defend-

ant The Western Pacific Railroad Company will bring on the aforesaid motion for hearing before the above-entitled Court.

Dated May 17, 1954.

/s/ ALLAN P. MATTHEW,
/s/ JAMES D. ADAMS,
/s/ BURNHAM ENERSEN,
/s/ ROBERT L. LIPMAN,

Attorneys for Defendant, The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

MOTION OF DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS

Defendant, The Western Pacific Railroad Company, moves the Court for Summary judgment against plaintiffs, pursuant to Rule 56, Federal Rules of Civil Procedure.

This motion is based upon the complaint and amended complaint herein, and on the orders, judgments and decrees, and the pleadings, papers, and

all other files and records in the above-entitled Court, and the reported decisions of the United States Supreme Court and of the United States Court of Appeals for the Ninth Circuit, in the following-described suit in equity and proceeding in bankruptcy:

1. The suit in equity, case No. 26,508 Civil, in the files of this Court, entitled "The Western Pacific Railroad Corporation, et al., plaintiffs, vs. The Western Pacific Railroad Company, et al., defendants," which suit is hereinafter referred to as the "Tax Saving Case."

2. The proceeding in Bankruptcy, No. 26,591-S in the files of this Court, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," which proceeding is hereinafter referred to as the "Reorganization Proceeding."

The Court has judicial knowledge of all said decisions, orders, judgments, decrees, records and files and the contents thereof.

This motion is made upon the following grounds:

(a) There is no genuine issue as to any material fact and this defendant is entitled to a judgment against plaintiffs as a matter of law.

(b) The complaint fails to state a claim upon which relief can be granted to plaintiffs or either of them.

(c) The issues sought to be litigated in this action have been determined against plaintiffs by:

(1) the judgment of this Court entered on January 13, 1950, in the Tax Saving Case;

(2) the orders of the United States District

Court for the Northern District of California, Southern Division, in the Reorganization Proceeding, which proceeding was terminated by final order entered on March 28, 1946.

The said judgment and orders have, and each thereof has, become final in all respects, and constitute complete and final determinations of and res judicata as to all issues between plaintiffs and this defendant herein.

(d) Plaintiffs base their claims upon facts and transactions which were the basis of their claims in the Tax Saving Case. All said facts and transactions were proved and are of record in the Tax Saving Case. In the Tax Saving Case plaintiffs invoked the full powers of the Court as a court of equity to grant relief to them on account of said facts and transactions. By the judgment of the Court therein, filed January 13, 1950, and affirmed by the United States Court of Appeals for the Ninth Circuit, as appears from its mandate of December 14, 1953, plaintiffs were denied all relief. The judgment provided as follows:

"It is by the Court Ordered, Adjudged and Decreed that the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, be denied all relief, and that the interveners be denied all relief, and that plaintiffs recover nothing and the interveners recover nothing from the defendants or any of them."

This judgment is res judicata as to all issues and questions herein between plaintiffs and this defendant.

(e) Plaintiff, The Western Pacific Railroad Corporation, presented its claim as unsecured creditor of the debtor in the Reorganization Proceeding. Said claim was determined to be without equity or value, and was expressly cancelled and discharged, in the Reorganization Proceeding, and its assertion by litigation was enjoined by the Final Order in said proceeding.

(f) In the Reorganization Proceeding, it was finally determined, after running the full gamut of court and administrative procedure, that plaintiff's claim was worthless. The reorganization was consummated in December of 1944 and the Reorganization Proceeding was finally terminated in 1946, and all orders and judgments therein have long since become final. For the Court to make any award to plaintiffs herein, or to grant any relief to them, would in effect modify the administrative and judicial judgments in the Reorganization Proceeding, contrary to the purpose and effect of Section 77 of the Bankruptcy Act.

(g) The orders and judgments in the Reorganization Proceeding are res judicata against plaintiffs as to all issues and questions herein between plaintiffs and this defendant.

(h) The claims of the plaintiffs herein are discharged, foreclosed and barred under and by virtue of Section 77 (f) of the Bankruptcy Act.

(i) It is not true that in and by the findings of this Court or the rulings of the United States Court of Appeals for the Ninth Circuit in the Tax Saving Case any fund was held or determined to exist in

the possession of this defendant, or at all, subject to any claim of plaintiffs or either of them, or to any other claim, on account of the tax savings which were the subject of the Tax Saving Case and are the subject of the complaint herein, or on any account. On the contrary, plaintiffs applied to the Court in the Tax Saving Case to have the tax savings deposited as a fund in court, and to have them dealt with as a fund, and for participation therein, but their application was not granted, and in and by the orders and proceedings taken and had by the Court in the Tax Saving Case, and the judgment therein, plaintiffs were denied all relief. Said orders, proceedings and judgments are res judicata against plaintiffs as to all issues and questions respecting the purported fund mentioned in their complaint herein.

(j) No indebtedness, obligation or liability to the plaintiffs or either of them of any kind, character or description was assumed by this defendant under or by virtue of the Assumption Agreement mentioned in the complaint herein, or in relation to the tax savings which are the subject of the said complaint, or at all. In the Tax Saving Case plaintiffs asserted claims thereunder and the judgment in the Tax Saving Case is res judicata against plaintiffs as to all issues and questions herein respecting the Assumption Agreement and the obligations thereunder.

(k) The plaintiffs' claims are barred by the statutes of limitations applicable thereto, to wit, Subdivisions 1 and 2 of Section 337, Subdivision 1

of Section 339 and Section 343 of the Code of Civil Procedure of the State of California.

Wherefore, this defendant prays for a summary judgment against plaintiffs herein and for its costs.

Dated May 17, 1954.

/s/ ALLAN P. MATTHEW,
/s/ JAMES D. ADAMS,
/s/ BURNHAM ENERSEN,
/s/ ROBERT L. LIPMAN,
Attorneys for Defendant, The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,
Of Counsel.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

DRAFT OF SUMMARY JUDGMENT PROPOSED BY DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, FILED PURSUANT TO RULE 3(b) OF THE RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Summary Judgment

The motion of defendant, The Western Pacific Railroad Company, for summary judgment pur-

suant to Rule 56 of the Federal Rules of Civil Procedure having come on for hearing before the Court ....., 1954, upon the said motion and the complaint and amended complaint herein, and the plaintiffs having appeared in opposition to said motion by Leroy R. Goodrich, Esq., their attorney, and the moving party having appeared by its attorney, Allan P. Matthew, Esq., and the motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said defendant is entitled to summary judgment as prayed in its motion;

Now, Therefore, it is hereby ordered, adjudged and decreed that defendant, The Western Pacific Railroad Company, do have and recover judgment against plaintiffs and each of them, upon each and all the grounds stated in its motion, each and every one of which said grounds is hereby found and determined to be a valid ground for this judgment; that the plaintiffs be and they are hereby denied all relief against said defendant; and that said defendant do have and recover from plaintiffs its costs herein, taxed in the amount of $.....

Done in Open Court this .... day of ....., 1954.

....., Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, FOR SUMMARY JUDGMENT

1. The Court may take judicial notice of the records and proceedings in the Tax Saving Case and in the Reorganization Proceeding.

U. S. v. Pink,
315 U. S. 203 (1942);

Latta v. Western Investment Co.,
173 F. 2d 99 (C.A. 9th, 1949), cert. den.,
337 U. S. 940;

Kelly v. Johnston,
111 F. 2d 613 (C.A. 9th, 1940), cert. den.,
312 U. S. 691.

2. The Tax Saving Case is res judicata as to all questions and issues herein between plaintiffs and defendant, The Western Pacific Railroad Company.

Cromwell v. County of Sac.,
94 U. S. 351 (1877);

Northern Pacific Railroad Co. v. Slaght,
205 U. S. 122 (1907);

Hatchitt v. United States,
158 F. 2d 754 (C.A. 9th, 1946);

Williamson v. Columbia Gas & Electric Corporation, 186 F. 2d 464 (C.A. 3rd, 1950), cert. den., 341 U. S. 921;

Wilson Cypress Co. v. Atlantic Coast Line R. Co., 109 F. 2d 623 (C.A. 5th, 1940), cert. den., 310 U. S. 653;

Miller v. National City Bank of New York,
166 F. 2d 723 (C.A. 2d, 1948);

Panos v. Great Western Packing Co.,
21 Cal. 2d 636 (1943);

Krier v. Krier,
28 Cal. 2d 841 (1946);

Woolverton v. Baker,
98 Cal. 628 (1893);

Restatement of the Law of Judgments,
§§61 and 63.

3. Plaintiffs' claim as unsecured creditor was cancelled and discharged in the Reorganization Proceeding.

In the Plan of Reorganization the claim was declared to be worthless and without equity or value. In the Revestment Order of November 27, 1944, it was "cancelled and discharged," the order providing that the reorganized company "shall assume only the valid and outstanding obligations of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged." The same order vested the estate and property in the reorganized company free and clear of all rights, claims, liens and interests of "the former stockholders and creditors of the debtor" and further provided that the reorganized company shall be "forever released and discharged from all of its debts, obligations and liabilities except as herein

provided." By the final order of March 28, 1946, all persons were perpetually restrained and enjoined from instituting or prosecuting any suit against the reorganized company "on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, * * * may have had in, to or against the debtor, or any of its assets or properties on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * *."

4. The Reorganization Proceeding cannot now be reopened.

Western Pacific R. Corp. v. Western Pacific R. Co., 85 F. Supp. 868 (N.D. Cal., 1949);

Insurance Group Committee v. Denver & Rio Grande Western R. Co., 329 U. S. 607 (1947).

The Erie Reorganization Cases:

Duryee v. Erie R. Co.,
175 F. 2d 58 (C.A. 6th, 1949) (cert. den., 338 U. S. 861), 91 F. Supp. 1009 (N.D. Ohio, 1950) (aff'd per curiam, 191 F. 2d 855, cert. den., 342 U. S. 948);

Beckley v. Erie R. Co.,
175 F. 2d 64, 76 F. Supp. 635;

Massie v. Erie R. Co.,
196 F. 2d 130 (C.A. 3rd, 1952);

In re Chicago, Rock Island & Pacific Ry. Co.,
168 F. 2d 587 (C.A. 7th, 1948), cert. den., 335 U. S. 855;

In re St. Louis-San Francisco Ry. Co., 68 F. Supp. 921 (E.D. Mo., 1946), (appeal dismissed on motion of appellees, 160 F. 2d 109).

See also Public Law 478, 80th Congress, effective April 9, 1948, 11 U.S.C.A., §208, providing that reorganization plans under §77 cannot be modified after consummation.

5. The Reorganization Proceeding is res judicata as to plaintiffs' claims.

New York v. Irving Trust Co., 288 U. S. 329 (1933);

Stoll v. Gottlieb, 305 U. S. 165 (1938);

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940).

6. The claim is barred by Section 77(f).

Section 77(f) provides that the plan and the order confirming it shall, subject to the right of judicial review, "be binding upon all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." It also provides that the property dealt with by the plan "shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan

be reserved" in the order confirming the plan or in the order directing revestment in the reorganized company. Section 77(f) also provides for the final decree upon termination of the proceedings.

7. There is no such "fund" as plaintiffs allege.

Plaintiffs assert that as a result of the findings in the Tax Saving Case the defendant is in possession of a "fund" of tax savings held by it for the benefit of the unpaid creditors of the debtor in reorganization. This is in error. The fact is, that in the Tax Saving Case the plaintiffs applied to the Court to have the tax savings treated as a fund held by defendant for plaintiffs' benefit (Complaint, Par. VII; Prayer of the Complaint, Pars. 1, 5; Supplemental Complaint, Par. Twelfth, subparagraph 4; Prayer of the Supplemental Complaint) but their application was not granted and they were denied all relief by the judgment in that case.

8. The judgment of the District Court, affirmed by the Court of Appeals, in the Tax Saving Case, was "that plaintiffs recover nothing," and no "machinery or medium" is now available to plaintiffs, either by asserted "successoral complaint" or otherwise, to change that final judgment into a judgment for plaintiffs.

9. The Assumption Agreement does not help plaintiffs.

(1) The Assumption Agreement was prescribed in the reorganization by the Revestment Order of November 27, 1944. That order expressly provides that "unsecured claims not entitled to priority over

existing mortgages" are not to be assumed and that they "are hereby cancelled and discharged."

(2) Plaintiffs relied upon the Assumption Agreement in the Tax Saving Case (see, e.g. Supplemental Complaint, paragraph Eleventh) but were denied all relief by the judgment in that case.

10. Plaintiffs' claims are barred by limitation. The applicable statutory period is two years (C.C.P. 339). In any event the four year periods under C.C.P. 337 and 343 have run. Twenty years have run since the plaintiff's claim as unsecured creditor arose; ten years have run since a tax reserve was ordered in the Reorganization Proceeding; eight years have run since the final order terminating the Reorganization Proceeding; and nearly seven years have run since the settlement of the tax matter with the Government.

Respectfully submitted,

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,

Attorneys for Defendant, The Western Pacific Railroad Company.

Dated May 17, 1954.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between plaintiffs and defendant, The Western Pacific Railroad Company, that the motion of said defendant for summary judgment herein may be set down for hearing June 11, 1954, at ten o'clock a.m., or as soon thereafter as counsel may be heard, before the Honorable Louis E. Goodman, Judge of the above-entitled court, such hearing being contemporaneous with the return day of the order to show cause issued May 13, 1954, and returnable at ten o'clock a.m. on June 11, 1954, before Judge Goodman, in the Matter of the Reorganization of The Western Pacific Railroad Company, No. 26591-S in Bankruptcy.

The parties above named respectfully request the Court to make its order in accordance with this stipulation.

Dated: May 25, 1954.

/s/ LEROY R. GOODRICH,
Attorney for Plaintiffs.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,
Attorneys for Defendant, The Western Pacific Railroad Company.

It Is So Ordered.

Dated: May 25, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 26, 1954.

[Title of District Court and Cause.]

MOTION OF THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DuPONT BAYARD, RECEIVER, PLAINTIFFS HEREIN, FOR A SUMMARY JUDGMENT AGAINST THE DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, PURSUANT TO RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

Now come the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, and move this court for a summary judgment against the defendant, The Western Pacific Railroad Company, pursuant to Rule 56, Federal Rules of Civil Procedure, on the following grounds:

(1) All essential allegations of the amended bill of complaint are within the judicial knowledge of this Court and are admitted to be true by the defendant Western Pacific Railroad Company in its pending motion for summary judgment against the plaintiffs.

(2) In Civil Action No. 26508, it was determined that the defendant Western Pacific Railroad Com-

pany was not accountable to the plaintiffs under the assumption agreement executed by it under the requirements of the final orders and decrees in the Bankruptcy cause No. 26591-S in respect of the use by the Trustees of a tax credit belonging exclusively to Western Pacific Railroad Corporation to discharge a tax liability of the Trustees in the amount of $17,201,739.00 because of (a) the fiduciary relationship then existing between Western Pacific Railroad Corporation and its wholly owned subsidiary Western Pacific Railroad Company in process of reorganization in the Bankruptcy Court, and (b) the obligation of the Western Pacific Railroad Corporation deemed to arise therefrom or to be consequent thereon to utilize its tax credit to satisfy the lawful claims of partially paid or wholly unpaid pre-reorganization creditors of its subsidiary.

(3) In the pending Civil Action No. 33514, brought by the same parties plaintiff as those in Civil Action No. 26508, to implement and make effective the determination in that action, a judgment or decree is asked adjudging that the $17,201,-739.00 fund in the custody of the defendant Western Pacific Railroad Company resulting from the expropriation of the tax credit belonging to the Western Pacific Railroad Corporation is a trust fund to be administered by the District Court for the unsatisfied pre-reorganization creditors, all of which are parties either plaintiff or defendant in said pending Civil Action No. 33514.

(4) Recognizing, as we submit, that there is no meritorious defense to Civil Action No. 33514, the

defendant Western Pacific Railroad Company is attempting to defeat it by securing a contempt order in the Bankruptcy cause No. 26591-S and to use such order to obstruct an appeal to the Court of Appeals whose determination it was that created the resulting trust. The plaintiffs herein have filed a return in the contempt proceeding, of which a copy is hereto attached and made a part hereof.

Wherefore, plaintiffs pray for a summary judgment against defendants herein and for their costs.

Dated: May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,
Plaintiffs,

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR,
/s/ WILLIAM MARVEL,
Counsel.

[Title of District Court and Cause.]

THE RESPONDENTS' RETURN TO THE ORDER TO SHOW CAUSE WHY THEY SHOULD NOT BE ADJUDGED GUILTY OF AND PUNISHED FOR CONTEMPT OF THIS COURT

Now come the respondents, plaintiff in Civil Action No. 33514, and as their Return to the Order to Show

Cause why they should not be adjudged guilty of and punished for contempt of this Court for violation of the final Order of this Court, dated March 28, 1946, respectfully show:

First: The successoral action commenced by the respondents in this Court, being Civil Action No. 33514, was brought against the defendant Western Pacific Railroad Company under the Assumption Agreement executed by the defendant Western Pacific Railroad Company as required by said final Order to enforce a valid and subsisting liability of the reorganization Trustees which was transferred to the reorganized Western Pacific Railroad Company; and it is an excepted action provided for and contemplated by said final decree of March 28, 1948, and in no respects violative thereof.

Second: Said successoral action was brought by respondents to implement a determination of the Court of Appeals in the Ninth Circuit in an earlier and substantially identical action brought by them under said Assumption Agreement, by providing a machinery or medium for the administration of a trust resulting therefrom in respect of a fund of $17,201,739.00 in the custody of the defendant Railroad Company but held by it subject to all of its obligations under said Assumption Agreement.

Third: Said successoral action was brought by the respondents under authority and at the direction of the Chancery Court of the State of Delaware, County of New Castle, as appears from the Affidavit of William Marvel, Attorney for the Receiver, filed herewith as part of this Return.

And having thus fully answered, and with profound respect, made their return to the Order, and adequate cause being shown, the respondents respectfully pray that the Order to Show Cause be dissolved.

Dated: May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By LEROY R. GOODRICH,
Their Attorney.

FRANK C. NICODEMUS, JR,
WILLIAM MARVEL,
Counsel.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM MARVEL, ATTORNEY FOR ALEXIS I. DuPONT BAYARD, RECEIVER

State of Delaware,
New Castle County—ss.

Be It Remembered that on this 26th day of May, 1954, personally came before me, the subscriber, a Notary Public for the State and County aforesaid, William Marvel, Attorney for Alexis I. duPont Bayard, Receiver, who being by me first duly sworn did depose and say:

That by order of April 19, 1950, he was appointed attorney of record for the said Receiver by the

Honorable Collins J. Seitz, Chancellor of the State of Delaware.

1. That Western Pacific Railroad Corporation is in process of liquidation in the Court of Chancery of the State of Delaware, in and for New Castle County, and Alexis I. DuPont Bayard is its Receiver; and that he is informed that it is one of the three unpaid pre-organization creditors of Western Pacific Railroad Company.

2. That the action in the District Court for the Northern District of California, Southern Division, designated as Civil Action No. 33514, was commenced under the general authority and direction of the Chancellor of the State of Delaware, by Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its Receiver, against the reorganized Western Pacific Railroad Company, as the principal defendant, and James Foundation of New York and Western Realty Company, the two remaining unsatisfied pre-organization creditors, as secondary defendants for the following reasons:

(a) That the final orders and decrees of the Bankruptcy Court in No. 26591-S required the defendant Western Pacific Railroad Company to execute an assumption agreement whereby it assumes all liabilities of the Trustees growing out of their operations as such Trustees in a period which included January 1, 1942-April 30, 1944, and excepted from the inhibitions in the final orders and decrees against further litigation any suit brought under the assumption agreement to enforce a liability of the Trustees growing out of such operation;

(b) That the stock-loss tax credit in the use of which by the Trustees a tax liability of the Trustees for said period amounting to $17,201,739 was relinquished by the Treasurer of the United States was the exclusive property of Western Pacific Railroad Corporation and was never an asset of the Western Pacific Railroad Company;

(c) That Western Pacific Railroad Corporation on October 10, 1946, in accordance with the authorization of the final orders and decrees in the Bankruptcy Court brought suit under the assumption agreement in the same District Court, being Civil Action No. 26508 against the reorganized Western Pacific Railroad Company, to require it to account to the plaintiff as the exclusive owner of said tax credit for the amount of taxes relinquished thereagainst by the Treasurer of the United States;

(d) That accountability to Western Pacific Railroad Corporation as owner of the tax credit was denied and its expropriation by the Trustees was finally sanctioned by the Court of Appeals, in the Ninth Circuit, for the reason, as determined by that Court, that Western Pacific Railroad Corporation, as owner of all preferred and common stock of the pre-reorganization Western Pacific Railroad Company, owed a fiduciary duty and obligation to utilize its credit for the benefit of the creditors of the pre-reorganization Railroad Company.

(3 That it was and is his opinion communicated

3. That it was and is his opinion communicated to Alexis I. DuPont Bayard, Receiver, that there is a justiciable question whether the defendant,

Western Pacific Railroad Company, under the assumption agreement as successor to the obligations of the Trustees is not as a consequence of the opinion of the United States Court of Appeals in the Ninth Circuit accountable to such creditors to the same extent that it would have been accountable to the Western Pacific Railroad Corporation if the superior equity of the unsatisfied creditors had not supervened.

4. That it was and is his opinion, also communicated to Alexis I. DuPont Bayard, Receiver, that the right of the Western Pacific Railroad Corporation and its said Receiver, as an unsatisfied creditor to require the Trustees to recognize their superior equity and to enforce that right under the assumption agreement against the defendant Western Pacific Railroad Company is in principle the same as the right asserted under the assumption agreement in Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508, which was not questioned by the Court of Appeals or the United States Supreme Court as being affected by the injunctive provisions of the decree of the Bankruptcy Court entered on March 28, 1946.

WILLIAM MARVEL.

Sworn to and subscribed before me the day and year aforesaid. Witness my hand and seal of office.

[Seal] FLORENCE P. BAGLEY,
Notary Public.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service of the papers hereinafter described is acknowledged by the undersigned this 1st day of June, 1954.

1. Motion of Western Pacific Railroad Corporation for summary judgment.

2. Notice of Motion.

ALLAN P. MATTHEW,

JAMES D. ADAMS,

BURNHAM ENERSEN,

ROBERT L. LIPMAN,

By /s/ JAMES D. ADAMS.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendant Western Pacific Railroad Company and to Its Attorneys, Allan P. Matthew, James D. Adams, Burnham Enersen, Robert L. Lipman, and McCutchen, Thomas, Matthew, Griffiths & Greene:

You Will Please Take Notice that on Friday, June 11, 1954, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, before the Honorable,

Louis E. Goodman, Judge of the above-entitled Court, at the Post Office Building, Seventh and Mission Streets, San Francisco, the plaintiffs, the Western Pacific Railroad Corporation and Alexis I DuPont Bayard, Receiver, will bring on the aforesaid motion for summary judgment.

Dated May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

MEMORANDUM TO THE COURT RE CONTEMPT

Plaintiffs' counsel are grateful for the privilege of filing this Memorandum, hoping as they do to convince the Court that their Bill of Complaint does not violate in any degree whatsoever the final injunctive order of the Bankruptcy Court.

When counsel and the Court are as far apart as

was evident at the close of the oral argument on June 11, 1954, the reason is unless counsel are irresponsible (which we believe we are not; being fully conscious of and sensitive to our obligations to the Court), that the Court and counsel are thinking at cross purposes; their minds are focusing on different but not necessarily irreconcilable concepts.

Contempt of Court is a very serious charge; one that ought not to be made recklessly. We submit that that charge has been made with sinister recklessness against the plaintiffs in this case.

This we shall not undertake to demonstrate, and for the opportunity so to do we again express our gratitude.

The injunction which the plaintiffs are said to have violated is in the final order of the Bankruptcy Court dated March 28, 1946, which very properly enjoins any suit against the reorganized defendant Western Pacific Railroad Company to enforce a pre-reorganization claim against it or against the property transferred to it under the revestment order, which also very properly includes the "earnings" of the property during trusteeship; and if the plaintiffs' Bill of Complaint can be construed as an attempt to tap the "earnings" of the property during trusteeship or to disturb the property itself, it clearly runs afoul of the injunctive order of the Bankruptcy Court.

But the plaintiffs' Bill of Complaint presents no such case; and we respectfully submit counsel seeking the contempt order know this just as well as we do.

The plaintiffs' case (this time it sues as a creditor of the late bankrupt and not as a stockholder), is against the defendant Western Pacific Railroad Company upon its Assumption Agreement to enforce an obligation of the trustees to account to the plaintiffs and other unsatisfied creditors of the late bankrupt for the value of the plaintiffs' tax credit so used, would have been paid to the Treasurer of the monies which, if the plaintiffs' tax credit were not used, would have been paid to the Treasurer of the United States. Funds transferred by the trustees under the revestment order are not "earnings" until all trustees' obligations are discharged and that is why the Assumption Agreement was exacted.

This Court in the prior case brought by the plaintiffs as sole stockholder of the late bankrupt held two things:

First: That Congress would have convicted itself of "plain stupidity" if its intention was to remit to a subsidiary taxes due from the subsidiary to offset a loss not sustained by the subsidiary; and

Second: That the District Court was bound to leave the money where it was because of the same final Order of the Bankruptcy Court as is now claimed to have been violated by the plaintiffs suing as an unpaid creditor instead of, as then, as the sole stockholder; i.e., the District Court sustained the defendant Western Pacific Railroad Company's plea of res adjudicata based on the same final order of the Bankruptcy Court that is now again invoked.

If that plea of res adjudicata had been sustained by the Court of Appeals there might be some excuse

for the present contempt proceedings; but it was not. Along with seven other defenses listed below it was rejected.*

Our concern here is with the plea of res adjudicata rejected in the prior case. But before taking it up in detail, there is one factor bearing on the ethics of the contempt proceeding which we wish to mention. The factor is that not one single appellate judge has yet seen fit to differ with the District Court's view that Congress did not intend the remitted tax monies to remain with the subsidiary the worthless of whose stock created the tax credit.

Judge Fee thought that all of the remitted taxes should go to the parent. In his dissenting opinion he said:

> "If the plaintiffs were still the owner of the stock of the defendant then the allocation of $17,000,000 to defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in the value of stock in defendant no longer is of avail to the plaintiffs there should be another method of applying the remission to loss."

Mr. Justice Jackson in his opinion (dissenting on a procedural point), said:

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*The defenses rejected by the Court of Appeals are unctuously summarized by their authors as follows: Discharged in bankruptcy pursuant to Section 77 of the Bankruptcy Act, res adjudicata, Estoppel, laches, failure of consideration, illegality, Statute of Limitations and Waiver. (Rec. 250.)

> "Indeed it is probable that the intention of the Statute permitting the consolidation of the two positions was to provide salvage for the loser, not profit for one which sustained no loss."

The majority opinion of the Court of Appeals written by District Judge Byrne in which Circuit Judge Healy concurred, does not condone the retention of the remitted tax monies by the defendant Railroad Company which sustained no loss. If the opinion means anything at all it can only mean that the remitted tax monies are a trust fund for the benefit of unpaid creditors. All that the majority opinion does, is affirm the judgment dismissing the plaintiffs' claim, not as held by the District Court on the plea of res adjudicata, but on the ground which we think quite defensible; i.e., that unsatisfied creditors had a prior right to the remitted taxes before the parent could be allowed to participate. This was not mere dictum. It was necessary to determine the rights of creditors in order to affirm dismissal of the suit of the stockholder plaintiff. All of the unsatisfied creditors are before the Court in the successoral action which is so framed that the District Court can administer the fund and determine the equities of all parties having or asserting a right therein.

The majority opinion written by Judge Byrne does not discuss the plea of res adjudicata but it must have been rejected. If it had been deemed a valid plea its acceptance would have ended the case. The Court, however, went forward on the merits.

Judge Fee in his dissenting opinion does, however, develop the reasons why this plea was properly rejected. In footnote 6, Judge Fee says:

> "The error of the lower Court was in assuming that the plaintiff is seeking an interest in the defendant corporation instead of property taken by the defendant which belonged to the plaintiff."

Counsel for the present plaintiffs, asserting their right as an unsatisfied creditor, framed the successoral Bill of Complaint in the light of and in reliance upon the binding decision of the Court of Appeals, that the former action was not barred by the final order of the Bankruptcy Court.

We respectfully invite the attention of the Court to the following paragraph from the affidavit of William Marvel, Esq., counsel for receiver Bayard, which was misread to the Court in oral argument:

> "that the right of the Western Pacific Railroad Corporation and its Receiver as an unsatisfied creditor to require the trustees to recognize their superior equity, and to enforce that right under the Assumption Agreement against the defendant Western Pacific Railroad Company, is (in principle)* the same as the right asserted under the Assumption Agreement in Western Pacific Railroad Corporation, et al., vs. Western

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*We trust that defendant counsel's omission of the words "in principle" in reading this paragraph to the Court was merely an unfortunate mechanical mistake.

> Pacific Railroad Company, et al., No. 26508, which was not questioned by the Court of Appeals or the United States Supreme Court as being affected by the injunctive provisions of the decree of the Bankruptcy Court entered on March 28, 1946."

We are confident that this Court, if it had been practicable at the oral argument to furnish the significant background of the plaintiffs' Bill of Complaint and its deep rooted sanction in the decision of the Court of Appeals would not have expressed any tentative opinion in the contempt proceeding, unless it had been an opinion that the contempt proceeding was an imposition upon the Court. There is not only no basis for this proceeding; it is frivolous and, we add regretfully, it is sinister.

It is frivolous because the Bill of Complaint is fully sanactioned by the decision of the Court of Appeals in No. 26508, and it is sinister because its illy veiled design is to obstruct an appeal to the Court of Appeals from any decision favorable to the defendant Railroad Company upon the pending motion for Summary Judgment.

The Judiciary Act provides for an appeal from a Summary Judgment and one would be taken promptly by the defendant Railroad Company from any decision adverse to it. But it does not want the equal protection of the laws extended to its adversary. Such an appeal would not only put in grave jeopardy its possession of $17,201,739; it would put their counsel in the awkward position of

repudiating the cause of the unpaid creditors for whom they shed crocodile tears when they argued No. 26508 in that same Court.

At the oral argument opposing counsel read from an Order of the Bankruptcy Court which (as they read it), purports to cancel the plaintiffs' claim allowed in the Section 77 proceeding in the amount of $7,609,370. All that this can mean is that the claim cannot be made the basis of a suit against the reorganized defendant Western Pacific Railroad Company or its property. To this we raise no question. But if counsel are asserting that the Bankruptcy Court attempted to extinguish the claim (to "inter" it, we think the counsel said), the order is beyond the jurisdiction of the Bankruptcy Court and to that extent is a palpable nullity. The claim subsists as a debt due the plaintiffs which they can satisfy out of any accommodation collateral or other available assets not transferred to the defendant Western Pacific Railroad Company and any monies which the trustees were liable to set apart for the beneficial owners of the tax credit which was used to discharge the war time tax liability of the trustees.

The plaintiffs' pending action is brought to enforce rights established in No. 26508 as to which the Court was powerless to give relief because of the framework of the Bill of Complaint and absence of the parties primarily interested.

The plaintiffs now sue in a creditor capacity, and the other creditor interests have been named as defendants, and the Court is equipped and hence em-

powered very expeditiously to write the final chapter of an amazing litigation.

Even if this Court should find on some theory (we can conceive of none), that there has been a technical violation of the injunction, there is no question of mala fides; at most there is an excusable mistake of law (excusable because the same mistake of law was made by Judge Fee and if not actually at least inferentially by Judges Byrne and Healy); and under these circumstances, coupled with the possibility that the Court's own conception may be a faulty one, it is respectfully suggested and urged that the order signed by the Court should facilitate and not make prohibitively difficult appeals on all matters under submission.

Let there be no misunderstanding, however, as to what the precise question before the Court in the contempt proceeding actually is. The sole question is whether Civil Action No. 33514 (the pending proceeding), is barred by the final order in No. 25591-S (the bankruptcy proceeding) and, if so, why Civil Action No. 26508 (the mis-called tax saving suit), was not also barred. The answer is obvious—neither is barred.

There was a further question adroitly confused with it on the oral argument by counsel supporting the contempt proceeding; i.e., whether Civil Action No. 33514 is barred by No. 26508. We think it is not and that the Court of Appeals will so hold. Here, however, there is no injunction and in the absence of a sweeping contempt order nothing to prevent either party from exercising its normal right to

appeal. This is the raison d'etre of the contempt proceeding and "is not cricket."

The plaintiffs submit that they have shown abundant cause why they are not in contempt and respectfully pray that the order to show cause be dissolved.

Dated: June 21, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR,
/s/ WILLIAM MARVEL,
Counsel.

Affidavit of Service by Mail attached.
[Endorsed]: Filed June 28, 1954.

[Title of District Court and Cause.]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs sue upon the claim of plaintiff Western Pacific Railroad Corporation, as an antecedent creditor of defendant, Western Pacific Railroad Company, a corporation. The claim sued upon was adjudicated and determined in the proceeding reorganizing defendant railroad company.[1]

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[1]233 I.C.C. 409; Ecker v. Western Pac. Railroad Company, 318 U.S. 448, 508, 509.

Therefore, defendant the Western Pacific Railroad Company's motion for summary judgment in its favor is granted.

The motion of plaintiffs for summary judgment in their favor is denied.

Dated: June 28, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed June 28, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

Civil Action No. 33514

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,

Plaintiffs,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants.

SUMMARY JUDGMENT

The motion of defendant The Western Pacific Railroad Company for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure having come on for hearing before the Court June 11, 1954, upon the said motion and the complaint

and amended complaint herein, and the plaintiffs having appeared in opposition to said motion by Leroy R. Goodrich, Esq., their attorney, and the moving party having appeared by its attorney, Allan P. Matthew, Esq., and the motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said defendant is entitled to summary judgment as prayed in its motion;

Now, Therefore, it is hereby ordered, adjudged and decreed that defendant The Western Pacific Railroad Company do have and recover judgment against plaintiffs and each of them; that the plaintiffs be and they are hereby denied all relief against said defendant; and that said defendant do have and recover from plaintiffs its costs herein, taxed in the amount of $.....

Done in open court this 28th day of July, 1954.

/s/ LOUIS E. GOODMAN,
Judge.

Approved as to form, as provided in Rule 5(d), Rules of the United States District Court for the Northern District of California.

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,
Plaintiffs.

By /s/ LEROY R. GOODRICH,
Their Attorney.

[Endorsed]: Filed July 28, 1954.
Entered July 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order made and filed on June 28, 1954, by the Honorable Louis E. Goodman, United State District Judge, by which order (1) the motion of plaintiffs for summary judgment in their favor was denied and (2) the motion of the defendant, the Western Pacific Railroad Company, for summary judgment in its favor was granted.

Dated: July 26, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs.

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL FOR COSTS

Know All Men by These Presents:

That Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, as Principals, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to transact its business of suretyship in the State of California, as Surety, are held and firmly bound unto the above named Defendants, Western Pacific Railroad Company, et al., in the full and just sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, lawful money of the United States of America, to be paid to the said Defendants, their successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of July, 1954.

The Condition of the Above Obligation is such, That

Whereas on the 28th day of June, 1954, in the above-entitled action between the above-named Plaintiffs and the above-named Defendants, an Order was entered granting the motion of the Defendant, Western Pacific Railroad Company, for summary judgment in its favor and denying a motion of the Plaintiffs for summary judgment in their favor;

and said Plaintiffs have appealed to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Plaintiffs above named shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the Order is modified, then the above obligation to be void; otherwise to remain in full force and effect.

/s/ LEROY R. GOODRICH,
Attorney for Plaintiffs.

[Seal] UNITED STATES FIDELITY & GUARANTY COMPANY,

By /s/ MILDRED DROST,
Attorney-In-Fact.

State of California,
County of Alameda—ss.

On July 27, 1954, before me, Boyd A. Gibson a Notary Public in and for the County of Alameda personally appeared Mildred Drost known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

/s/ BOYD A. GIBSON,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM SUMMARY JUDGMENT

Notice Is Hereby Given that Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, plaintiffs, hereby appeal to the United States District Court of Appeals for the Ninth Circuit from the summary judgment made on July 28, 1954, by the Honorable Louis E. Goodman, United States District Judge, in favor of the Western Pacific Railroad Company and against the plaintiffs and each of them which judgment was filed on July 28, 1954.

Dated: August 24, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By /s/ LEORY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Bill of complaint.

Amended bill of complaint.

Notice of motion.

Motion of defendant The Western Pacific Railroad Company for summary judgment against the plaintiffs with draft of proposed judgment attached.

Points and authorities in support of motion by defendants Western Pacific Railroad Company for Summary Judgment.

Stipulation.

Motion of The Western Pacific Railroad Corporation, etc., for summary judgment with respondent's return to order to show cause attached.

Acknowledgment of service.

Notice of motion.

Memorandum to the court re contempt.

Order re motions for summary judgment.

Summary judgment.

Notice of appeal filed July 28, 1954.

Cost bond on appeal.

Notice of appeal from summary judgment, filed Aug. 26, 1954.

Designation of record on appeal.

1 Volume of Reporter's transcript of June 11, 1954.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of September, 1954.

C. W. CALBREATH,
Clerk,

By /s/ WM. C. ROBB,
Deputy.

[Endorsed]: No. 14515. United States Court of Appeals for the Ninth Circuit. Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, Appellants, vs. Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed September 16, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14515

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs and Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants and Appellees.

STATEMENT OF POINTS ON WHICH THE WESTERN PACIFIC RAILROAD CORPORATION WILL RELY

The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its receiver, have heretofore appealed to the United States Court of Appeals for the Ninth Circuit from the Order Re Motions for Summary Judgment made by the District Court in the above-entitled matter on June 28, 1954, and from the Summary Judgment made and entered therein by said District Court on July 28, 1954, in Civil Action No. 33514.

Appellants hereby make the following statement of points upon which they will rely on their appeal:

1. That the District Court was in error in mak-

ing its Order Re Motions for Summary Judgment, and in the making and entry of its Summary Judgment. The order and the judgment were made by the Court upon the ground that the claim sued upon, in the above-entitled action No. 33514, was adjudicated and determined in Proceeding No. 26591, reorganizing The Western Pacific Railroad Company, and in the plan of reorganization approved by the District Court and confirmed by the Supreme Court of the United States, 318 U. S. 448, in 1943, and, as alleged by The Western Pacific Railroad Company, by the judgment in the so-called "tax saving case," numbered 26,508 Civil, which was decided by the same District Court on September 6, 1949, and on appeal, in No. 12506, by the Court of Appeals on October 9, 1951.

But the issues which are presented in Action No. 33514, the capacity in which The Western Pacific Railroad Corporation there appears, and the nature and extent of the relief sought, are new and different, and are based upon legal and equitable claims never presented to any court heretofore.

In the original bankruptcy proceeding, The Western Pacific Railroad Corporation appeared as the single stockholder owning all of the common stock of the corporation. It was also a creditor of The Western Pacific Railroad Company, having advanced large sums of money to the operating company as loans. The plan of reorganization adopted by the Interstate Commerce Commission and confirmed by the Courts made no provision for payment of the moneys owed to it by the operating company,

on the ground that the total value placed by the Commission upon the assets of the operating company was less than the total liabilities.

In the "tax saving" case, The Western Pacific Railroad Corporation appeared as the parent corporation and the taxpayer in whose name tax returns were filed, and whose tax credits with the Federal Government, arising out of its stupendous $75,000,000 loss in the bankruptcy of its subsidiary, were used by that subsidiary to effect a saving of $17,000,000 in taxes. In that case the Railroad Corporation appearing as the taxpayer asked the District Court to determine that, under the provisions of the federal statutes, the tax savings made possible solely by reason of the loss, belonged in good faith to the taxpayer who had in fact suffered that loss. This Court in its judgment rendered in 1951 (No. 12506), and the able opinion of Judge Byrne held that the Corporation, because it was the parent corporation, was under a fiduciary duty to its subsidiary to join in consolidated returns and thereby donate its tax credit, and the savings made possible by the use thereof, to the Railroad Company in the interest of its unpaid creditors.

Basing their petition in No. 33514 squarely upon the judgment of this Court, appellants filed their complaint, in No. 33514 Civil, asking on their own behalf and on behalf of the other pre-reorganization creditors whose claims had not been paid, that in like manner and under a like fiduciary duty, the Railroad Company be required to devote the tax savings so received to the benefit of the unpaid and

unsatisfied creditors of the debtor in the bankruptcy proceedings, in whose behalf it was made possible.

That said complaint was filed with full respect to the District Court, and within the terms and provisions of the Final Order of the Court in the bankruptcy action, No. 26591 and the Assumption Agreement entered into by the defendant.

2. That for the same reasons, the District Court was in error in its judgment in the contempt proceeding under the bankruptcy proceeding No. 26514 heard simultaneously with the motions for summary judgment in the foregoing Civil Action No. 33514.

/s/ LEROY R. GOODRICH,
Attorney for Appellants.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed September 7, 1954.

Nos. 14,515 and 14,501

IN THE

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.*	No. 14,515
IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	
THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14,501

APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

WESTERN PACIFIC RAILROAD CORPORATION,
ALEXIS I. DU PONT BAYARD, Receiver,
Appellants.

By LEROY R. GOODRICH,
Their Attorney.

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
1203 Central Bank Building, Oakland 12, California,
Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Authorities Cited

Cases

Codes

Texts

Nos. 14,515 and 14,501

IN THE

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.*	No. 14,515
IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.* THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14,501

APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

As appellants' counsel view the appellee's motions to dismiss or affirm, they are made without any serious expectation of success. The purpose we visualize is a covert gesture of innocence in withholding from the

Interstate Commerce Commission and from the participating preferred stockholders information respecting the pendency of the appellants' appeals in this Court.

The motions are without merit.

Three grounds are alleged in No. 14,515:

(a) This appeal is frivolous and presents no substantial question;

(b) The appeal is a contempt of Court; and

(c) The appellate proceeding has been, and unless it is dismissed will continue to be used by appellants for improper purposes of vexation and harassment.

We shall take these up in their reverse order.

(1) What is meant by the appellee's reference to this appeal as one being "used by appellants for improper purposes of vexation and harassment" is made clear in its memorandum, where counsel say: "Appellants relying upon the fact that these appeals are pending, have undertaken to criticize the exchange proposals and to call for an I. C. C. hearing—all this in the hope, no doubt, that in order to be free of their interference appellees would make some payment to them for their worthless claims."

Although we apprehend that it may be difficult for appellee's counsel to understand an attitude so quixotic, the truth is that the claims represented by the appellants and their counsel are not for sale at any price. They commenced and are prosecuting this litigation to secure a judicial determination of their

rights by the tribunals set up for that purpose by the Constitution and laws of the United States; and there is no basis whatever for the appellee's unjustifiable insinuation that they can be bought off short of the attainment of that objective.

(2) If there has been any misuse or abuse of federal judicial processes in this litigation, it is chargeable against appellee's counsel for their sinister contempt proceeding designed indubitably to vex and harass the appellants in invoking the appellate jurisdiction of this Court.

In spite of the contrary view of the District Court whose contempt order is based upon a misconstruction and misapplication of the injunctive provisions of the decree of the Bankruptcy Court in the proceeding 26,591-S, there was no violation thereof by the filing of the successoral Bill of Complaint. We think this is the law of this case, as determined by this Court in the earlier Action No. 12,506. Both proceedings are in principle identical in that they were brought against the defendant Western Pacific Railroad Company under the Assumption Agreement which it executed in accordance with a vital condition prescribed in the final orders in the bankruptcy proceeding; both proceedings were brought to require the reorganized defendant Western Pacific Railroad Company to account for the use by the reorganization trustees of a tax credit belonging *not* to the trustees and *not* to the debtor in bankruptcy but belonging exclusively to appellant Western Pacific Railroad Corporation.

Judge Fee explained this in footnote 6 to his dissenting opinion in No. 12,506 wherein he said:

> "The error of the lower Court was in assuming that the plaintiff is seeking an interest in the defendant corporation instead of property which belonged to the plaintiff."

There was no disagreement with this conclusion expressed in the majority opinion of Judges Healy and Byrne; and if there had been such disagreement it would have ended the case forthwith on the defendant's plea of *res adjudicata.* What happened was that Judges Healy and Byrne treating the case as wide open (as clearly it was) decided it *not* in favor of the defendant Western Pacific Railroad Company as its counsel persists in pretending they did; but decided it *against* the appellants *as sole stockholder* of the bankrupt debtor on the ground that the creditors of the bankrupt debtor were the real beneficiaries. We cite the prior decision of this Court in No. 12,506 *Western Pacific Railroad Corporation, et al. v. Western Pacific Railroad Company, et al.,* 197 Fed. 2d 994, as *res adjudicata* upon the question, if there ever was one, whether the institution of the former suit or of this suit violates the injunction in the final decree in the reorganization proceeding, 26,591-S.

(3) The appeals pending in this Court are not frivolous and are meritorious, presenting among other ones, the following substantial questions:

(a) Is this successoral action an equity properly brought under an original bill in the nature of a sup-

plemental bill to implement and carry into effect the determination of this Court in No. 12,506?[1]

(b) Did the Bankruptcy Court have power to cancel and did it intend to cancel the valid and subsisting indebtedness of the debtor which had been proved and allowed in the Bankruptcy proceedings?[2]

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[1]A successoral Bill of Complaint, being an original bill in the nature of a supplemental bill to enforce and carry into effect a determination or decree of the same Court or of a different Court as the exigencies of the case or the interest of the parties may require, is traditional in our equity jurisprudence. Storey's Equity Pleading Sections 20-21, 336-340, 350. See also Section 349 and authorities cited in the text, including *Shields v. Thomas*, 18 How. 253. The terminology is that of the late Circuit Judge Walter H. Sanborn. At the winding up of the reorganization in 1897 of Union Pacific Railway Company under consolidated creditors and foreclosure bills, a number of properties had not been reached by either of them because of the limited framework of the bills themselves; the location of the properties; the absence of interested parties or the existence of special equities. To bring in these properties and adjust these equities, Judge Sanborn directed the filing—in some cases by the original receivers—of successoral bills of complaint and in at least one instance appointed successoral receivers.

[2]Title II—Sec. 205(f) of the United States Code provides:

> "Upon confirmation of the plan, the debtor and very often corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the orders of the judge relative thereto, under and subject to the supervision and control of the judge, the laws of any state or the decision or order of any state authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, *or where retained by the debtor pursuant to the plan*, shall be free of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities except such as may consistently with the plan be reserved."

This is the statutory authority under which the District Court made the order cancelling the unpaid indebtedness of the debtor and obviously the cancellation is only a discharge thereof *against the debtor*. The Bankruptcy Court has no power whatever to cancel the indebtedness of the debtor so as to prevent its en-

(c) Is the judgment or decree of the District Court entered under mandate of this Court in No. 12,506, brought by the appellant Western Pacific Railroad Corporation in its capacity as sole stockholder and parent in consolidated federal tax returns, a bar to the prosecution of this successoral action brought in the Court by the same appellant in its capacity as unsatisfied creditor to reach property which does not now or never did belong to the debtor or its successor in reorganization?[3]

(d) Is the defendant Railroad Company entitled to the fund of $17,201,739.00?[4]

Finally there is a motion to dismiss the appeal in No. 14,501 on the ground that it is interlocutory and non-appealable.

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forcement against some person, corporation or property secondarily liable. In *Ecker, et al. v. Western Pacific Railroad Corporation, et al.*, 318 U.S. 448, the Supreme Court held that the Bankruptcy Court had no power to cancel accommodation collateral. From whence then does it derive the authority (except as to this debtor) to cancel the primary indebtedness for which the accommodation collateral stands as security? To borrow one of the intemperate terms of our talented adversary, the motion is "*preposterous*".

[3]To make a former judgment a bar to the maintenance of a later suit "there must be identity of the quality in or for whom the claim is made, or, in other words, identity of the parties in the character in which they are litigants." Corpus Juris 1165, citing *Washington etc. Steam Packet Company v. Sickles*, 24 How. 333; *Elliott v. Hudson, et al.*, 18 Cal. App. 642. And it is essential under the *Duchess of Kingston's* case upon which the whole modern doctrine of *res adjudicata* is constructed that the decision be upon the *merits*. Where are we to find in the prior decisions and opinions in this litigation any suggestion that the defendant Western Pacific Railroad Company is entitled to the money?

[4]We plight our faith in the prior decision of this Court that the creditors of the debtor company, which under the rule of reason means the *unsatisfied* creditors, are entitled to full and complete payment before any part of the remitted taxes are adjudged to belong to any other party.

Again we disagree.

The contempt order is a non-factual, purely legal determination (we think an erroneous one) that the filing of the appellant's Bill of Complaint was a violation of the injunction in the final decree of the Bankruptcy Court in No. 20591-S. As such it was final, appealable and is properly within the reviewing power of this Court.

In further opposition to said motions, appellants file herewith an Affidavit of Leroy R. Goodrich, the attorney for the Western Pacific Railroad Corporation in this litigaton, together with a copy of a letter sent by the Receiver, Alexis I. du Pont Bayard, to the President of the appellee railroad company on September 14, 1954, and a copy of the reply sent by W. B. Whitman to said Receiver on September 24, 1954.

All of which is respectfully submitted.
Dated, October 14, 1954.

WESTERN PACIFIC RAILROAD CORPORATION,
ALEXIS I. DU PONT BAYARD, Receiver,
Appellants.

By LEROY R. GOODRICH,
Their Attorney.

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
Counsel.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,515

The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver,
Appellants,
vs.
The Western Pacific Railroad Company,
Appellee.

AFFIDAVIT OF LEROY R. GOODRICH

State of California,
County of Alameda.—ss.

Leroy R. Goodrich, being first duly sworn, deposes and says:

(1) That I am the attorney for The Western Pacific Railroad Corporation, appellant in the above entitled proceeding;

(2) That Alexis I. du Pont Bayard is the Receiver of The Western Pacific Railroad Corporation; that as such Receiver on September 14, 1954, upon the advice of his counsel, Mr. Bayard sent to F. B. Whitman, President of The Western Pacific Railroad

Company, the appellee in the above entitled matter, a letter, a copy of which is attached hereto and marked Exhibit A;

(3) That I am informed by Mr. Bayard that on September 24, 1954, F. B. Whitman, President of the appellee railroad company, sent to Mr. Bayard a reply, a copy of which is attached hereto and marked Exhibit B.

Leroy R. Goodrich.

Subscribed and sworn to before me this 14th day of October, 1954.

(Seal) Marion Treml,
Notary Public in and for the County of Alameda, State of California.
My commission expires March 18, 1956.

EXHIBIT A

Alexis I. du Pont Bayard
Star Building
Wilmington, Delaware

September 14, 1954

F. B. Whitman, Esquire
President
Western Pacific Railroad Company
San Francisco, California

Dear Sir:

This refers to your circular dated September 8, 1954 addressed to the holders of your company's Participating Preferred Stock. This circular embodies an offer stated to have been approved by your company's Board of Directors to exchange up to 225,000 shares of such stock for Debenture Bonds and Common Stock and representing that non-assenting stock together with 83,211 additional shares specified for redemption, will be redeemed at par plus accrued and unpaid dividends by use of your company's available cash.

Whether the lawyers representing Western Pacific Railroad Company should have permitted an exchange offer to be set in motion during the pendency of our appeals to the Court of Appeals involving the availability for use by your Company of any part of the $17,201,739 in your custody which, I contend, is impressed with in trust for other purposes, raises question as to which I express or imply no opinion.

But, since you are soliciting assents of your Participating Preferred Stockholders without disclos-

ing the pendency of these appeals, which, if successful, will reduce your unappropriated surplus, represented to be $53,902,739 at June 30, 1954, to less than $36,700,500 and may so impair your cash position that you will be unable to redeem the shares which it will be necessary to redeem, I respectfully suggest that your circular is fatally defective in withholding from your Preferred Stockholders full and correct information respecting the pending appeals.

Even if the Interstate Commerce Commission should approve the proposed exchange and authorize the new securities the transaction may well be invalidated by the Courts.

Accordingly we are sending a copy of this letter to the Chairman of Division 4 and to the Director of the Bureau of Finance of the Interstate Commerce Commission, with the suggestion that the applications for Interstate Commerce Commission approval be dismissed for deficiencies in this circular of September 8, 1954, or that the applications be held in abeyance pending the determination of the appeals now on the Docket of the Court of Appeals for the Ninth Circuit.

May I ask that you bring this letter to the attention of Blyth & Company, Inc. and Union Securities Corporation, the underwriters.

Yours very truly,

Alexis I. du Pont Bayard
Alexis I. du Pont Bayard
Receiver of Western Pacific
Railroad Corporation

AIduPB:DeH

EXHIBIT B

The Western Pacific Railroad Company
Western Pacific Building
526 Mission Street
San Francisco 5 California

September 24, 1954

W. B. Whitman
President
Mr. Alexis I. du Pont Bayard
Star Building
Wilmington, Delaware

Dear Sir:

This refers to your letter of September 14, 1954 and to what I consider to be a wholly unwarranted interference in the affairs of The Western Pacific Railroad Company.

In extensive litigation, both inside and outside of the reorganization proceeding, it has been finally and conclusively determined that The Western Pacific Railroad Corporation has no claim against The Western Pacific Railroad Company. Your attempt in the proceeding now pending to assert once more these claims determined to be without merit has been held to be a contempt of court and characterized by the District Judge as an affront to the judicial process.

Since I am compelled to conclude that your letter of September 14, 1954 and your attempt to interfere with the Western Pacific refinancing is purely

vexatious and since I am advised by counsel that your duties as receiver of the Corporation do not extend to interference in the affairs of the Company, you will please take notice that The Western Pacific Railroad Company will, in addition to such other steps as it may be advised, hold you, your advisors and those associated with you personally responsible for any loss or inconvenience to it resulting from your letter of September 14, 1954 and your activities in that connection.

A copy of this letter will be sent to the Interstate Commerce Commission.

Very truly yours,

F. B. Whitman

F. B. Whitman

No. 14502

United States
Court of Appeals
for the Ninth Circuit.

BUTCHERS UNION LOCAL No. 563, Affiliated With Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

COMMERCIAL PACKING COMPANY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-10-54

No. 14502

United States
Court of Appeals
for the Ninth Circuit.

BUTCHERS UNION LOCAL No. 563, Affiliated With Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

COMMERCIAL PACKING COMPANY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-19-54

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

DAVID SOKOL,
354 S. Spring St.,
Los Angeles 13, Calif.

For Appellee:

MILTON S. TYRE,
650 S. Grand Ave.,
Los Angeles 17, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 16818 T

COMMERCIAL PACKING CO., INC.,

Plaintiff,

vs.

BUTCHERS UNION LOCAL No. 563, Affiliated With Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Defendant.

COMPLAINT FOR DAMAGES

The plaintiff Commercial Packing Co., Inc., complains of the defendant and for a cause of action alleges as follows:

I.

This cause of action arises under the laws of the United States regulating commerce and more particularly under Section 301 of the Labor-Management Relations Act, 1947, known as Public Law No. 101, 80th Congress of the United States, Chapter 120, and amended by Public Law No. 189, 82nd Congress, and commonly referred to as the Taft-Hartley Act.

II.

Plaintiff has been at all times hereinmentioned and is now a California corporation organized and

doing business under any by virtue of the laws of the State of California, with its principal [2*] office in the County of Los Angeles.

III.

Plaintiff buy and raises cattle and hogs of all types and slaughters, processes, packages and after slaughtered and processed or packaged sells them. A substantial portion of such purchases and sales are made in commerce within the meaning of the Taft-Hartley Act. Plaintiff annually ships to points outside the State of California said merchandise with a value in excess of $1,000,000.00 and imports annually from states outside the State of California said merchandise with a value in excess of $1,000,-000.00.

IV.

The defendant was at all times hereinmentioned and is now a voluntary labor organization composed of many persons who are associated together to transact the business generally transacted by a labor organization as that term is generally known under the Taft-Hartley Act; and was at all times hereinmentioned and is now chartered by and affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, a national labor organization, which in turn is affiliated with American Federation of Labor, a national labor organization.

V.

Plaintiff was at all times hereinmentioned and is

*Page numbering appearing at foot of page of original Certified Transcript of Record.

now a member in good standing of Meat Packers, Incorporated, a California corporation, with its principal office located in the County of Los Angeles, State of California. Said corporation is a membership corporation composed of various meat packers doing the same or similar type of business as plaintiff within a general area within the County of Los Angeles, State of California. Said corporation has been at all times hereinmentioned and is now the authorized agent and representative of the plaintiff for the purpose of negotiating and executing collective bargaining agreements with various labor organizations, including the defendant, covering wages, hours [3] and other working conditions of the plaintiff's employees, excluding executive, administrative, professional and non-production-working supervisory employees. Any and all collective bargaining agreements executed by said Meat Packers, Incorporated, are made for this plaintiff as the real party in interest and for the direct benefit of the plaintiff and for the purpose of obligating the plaintiff to the various covenants, terms and conditions contained therein.

VI.

Pursuant to the authority and agency described in the preceding paragraph of this complaint, on or about March 1, 1951, the plaintiff acting through said Meat Packers, Incorporated, entered into that certain written collective bargaining agreement with the defendant covering wages, hours and working conditions of the plaintiff's production employees,

but excluding operating engineers, teamsters, office and clerical workers, non-working foremen and supervisory employees in performing duties covered by said agreement. Under the terms of said Agreement and particularly Article XVI thereof, said agreement was at all times hereinmentioned, is now, and will until March 1, 1956, remain in effect. Under the further terms of said agreement either party could open said agreement annually for negotiations of weekly rates of pay and hours only by giving notice as required in said Agreement not less than 60 days prior to March 1, of any year. Pursuant to such reopening adjustments on wages of employees covered by said agreement were made on or about March 1, 1952; March 1, 1953, and March 1, 1954. There is attached hereto marked Exhibit A and by this reference made a part hereof with the same force and effect as though fully set forth hereat a true and correct copy of said agreement. Commencing at page 8a thereof there is set forth the weekly rates of pay for each of the classifications covered by said agreement for the years from and including 1951 through 1954. The plaintiff has been at all times hereinmentioned and is now observing and performing without [4] default all of the covenants, terms and conditions required of it as employer under Exhibit A.

VII.

Although said rates are listed as weekly they are based on a 40-hour week, and the hourly rate for all purposes is determined by dividing 40 into the weekly rate. On or about January 31, 1952, the de-

fendant, through its duly authorized agents acting during the course and within the scope of their employment for and on behalf of the defendant, without any cause or provocation whatsoever, without any reduction of pay having been instituted or threatened to be instituted, and without the permission or consent of the plaintiff or said Meat Packers, Incorporated, caused meetings and conferences to be held by said agents with, and directions and instructions to be issued from said agents to, its various union stewards and members employed by plaintiff as the direct and natural result of which the rate of production by said employees was arbitrarily reduced from the rate of production generally prevailing in the plant of the plaintiff for many months immediately prior to January 31, 1952. This arbitrary reduction has been known by the defendants, its agents and the plaintiff-employer and is hereafter referred to as "controlled kill." The generally prevailing rate of production during said period before January 31, 1952, was an average of 1.83 head of cattle or hogs per hour per employee employed as a "knife man" on the killing floor of the plaintiff's plant. A knife man is one who is employed in certain of the classifications described in Exhibit A under the heading "Killing"; and the duties of said knife men include, among other things, the use by such men of a knife in performing the duties required of them under Exhibit A. Immediately after January 31, 1952, and continuously since that date except for the months of May, June, July and August, of 1952, when the de-

fendant caused a partial lifting of the controlled kill, proximately by reason of the said meetings, conferences, directions and instructions and as a [5] direct and natural result thereof and in violation by the defendant of Exhibit A, the said rate of production per hour per knife man as aforesaid immediately decreased substantially below the previous average of 1.83. The average rate for the period from February 1, 1952, through April 30, 1954, was 1.42, resulting in a decrease of .41.

VIII.

The plaintiff continuously since January 31, 1952, and to date has requested and demanded of the defendant through its duly elected, authorized and acting executive secretary, its several duly elected, authorized and acting business representatives, its duly elected, authorized and acting president, its duly elected, authorized and acting stewards employed by the plaintiff, and through the defendant's various members employed by plaintiff under and pursuant to Exhibit A, that the defendant revoke, cancel, rescind or withdraw its instructions and directions which have been continuously since that date and are now causing the employees of the plaintiff to reduce their rate of production as aforesaid. The defendant through its agents have failed and refused and continue to fail and refuse to comply with said requests or demands of the plaintiff or in any other way to cause or request the employees of the plaintiff to resume the rate of production maintained by said employees prior to

January 31, 1952, or any rate other than the controlled kill rate.

IX.

The said directions and instructions of the defendant were and are in direct violation of the terms, conditions and covenants of Exhibit A, and particularly but without being limited to the express and implied provisions thereof which prohibit strikes. As a direct and natural result of said breach of contract, plaintiff was required to pay and did pay for its general, administrative and direct and indirect labor costs and expenses allocable only to the production and sale of beef and not of hogs or the products processed therefrom (with only a few exceptions) the same amount of money to [6] operate the plant with controlled kill as it would have paid without it. Except for those few items of general, administrative and direct and indirect labor costs and expenses which were less than the sums which the plaintiff would have been required to pay had there been no breach of contract, a proportion of all of the other said sums so paid by the plaintiff equal to the proportion which the decrease in the average rate of production under controlled kill bears to the average rate with normal production, that is, .41 to 1.83, or 22.4%, was and is a direct loss to the plaintiff. The total of such general, administrative and direct and indirect labor costs and expenses, excluding those which would have been higher if there had been normal production and including only those allocable to the production and sale of beef and not of hogs or the

products procured therefrom, which the plaintiff paid during the period from January 1, 1952, through April 30, 1954, was $2,387,317.87. The total loss, therefore, sustained by the plaintiff as a direct and natural result of the defendant's breach of contract as aforesaid through April 30, 1954, was and is 22.7% of $2,387,317.87 or $534,759.20. Defendant as aforesaid has continued to violate the contract as aforesaid, and plaintiff at the time of trial will request leave of court to amend these pleadings and proceedings in order to insert the additional damages which will be incurred by the plaintiff from and after April 30, 1954, as a direct and natural result of the defendant's continued breach of contract.

Wherefore, plaintiff prays for judgment against the defendant as follows:

1. For the sum of $534,759.20 damages and for such further sums as damages as may be incurred from and after April 30, 1954, to the date of trial;

2. For interest at the rate of 7% per annum on the damages computed reasonably so as to compensate the plaintiff for its loss as incurred week by week from February 1, 1952, to the date of [7] judgment; and

3. For such other and further relief as to the court may seem proper.

/s/ MILTON S. TYRE,
Attorney for Plaintiff. [8]

EXHIBIT A

This Agreement, made and entered into this 24th day of January, 1951, by and between Meat Packers Incorporated, hereinafter referred to as the Employer, and the Butchers Union, Local No. 563 of the Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., affiliated with the Western Federation of Butchers of California, hereinafter referred to as the Union:

Witnesseth

Article I.

Recognition of the Union:

1. The Employer recognizes the Union as the representative for purposes of collective bargaining as to wages, hours and working conditions on behalf of all production workers except Operating Engineers, Teamsters, Office and Clerical Workers, non-working Foremen, and any and all supervisory employees who do not perform any duties covered by this Agreement.

2. It is mutally agreed that only employees doing work that comes under the jurisdiction of the Butchers Union, Local No. 563, A. F. of L., shall be allowed to perform work as provided for in this Agreement.

3. The Company shall have the right to hire any person as a new employee. Every new employee shall be a temporary employee for a period of

Exhibit A—(Continued)

thirty (30) days from the date he first reports for work and the continued employment of said employee shall be at the exclusive discretion of the Employer during the trial period. Any new employee who shall be retained by the Company for more than such probationary period of thirty (30) days shall become and remain a member of the Union as a condition of employment.

4. The Employer agrees to notify the Union of new hire on the date of employment of the employee.

5. The Employer agrees to call the office of the Union and give consideration to those unemployed in the classifications involved in this Agreement, providing they meet the qualifications necessary for employment.

6. New employees shall draw regular Union wages during trial period. All extra employees after thirty (30) days of employment shall be classed as regular employees on the payroll.

7. The Employer agrees to prominently display the Union Shop Card at all times in one or more places. [9]

* * *

Article V.

Working Conditions

1. It is further mutually agreed that the Employer will furnish his employees with coats and

Exhibit A—(Continued)

luggers and such uniforms as may be required by the Employer and pay for the laundering of the same.

2. Two (2) rest periods shall be allowed without deduction of pay, at regular times in each shift to be mutually agreed upon by the Employer and the Union, a.m., fifteen (15) minutes, p.m., ten (10) minutes.

3. A regular starting time shall be established by the Employer for each shift and plant operation in each individual plant, such schedule shall be properly posted and a copy mailed to the Union.

4. When employees are requested to report for work on Saturdays, Sundays or Holidays, they shall be guaranteed a minimum of four (4) hours' work in their department.

5. Employees properly reporting for work and kept waiting a period of time before starting to work shall be paid their regular scale for such waiting period.

6. Employees reporting late shall be permitted to start work on the next quarter (¼) hour period. Employees reporting late for work any day during their regular guaranteed work week shall forfeit their guarantee for the day they report late for work and shall be paid for only the hours actually worked on that day.

7. Employees required to work more than five (5) hours without time off for lunch, shall be paid

Exhibit A—(Continued)

time and one-half (1½) for all time worked over the five (5) hour period until a lunch period is given.

8. An employee temporarily working in a higher classification shall be paid the rate of the highest classification for the time actually worked on such classification.

9. An employee regularly working in two (2) or more classifications during a work week shall have his rate established at the rate for the highest classification so worked.

10. Employees shall be allowed time off without pay for official business for the Union, provided reasonable advance notice is given and further provided that the total of such time off shall not exceed thirty (30) days, unless prearranged between management and Union representatives.

11. In the event that any jobbing house or meat cutting or similar work shall be done, then that work shall be classified as such and the employees paid the prevailing rate for the area. This does not apply to classifications now listed in the present Agreement.

12. In the event that there are new jobs or classifications created they shall be subject to negotiations.

13. When employees are temporarily transferred from one department to another, said employee

Exhibit A—(Continued)

shall not work more than gang time of his regular department. [10]

* * *

Article VII.

Disputes, Grievance, Union Representation Thereof

1. No employee shall be discriminated against by reason of his activities in, or his representation of the Union.

2. No employee covered by this Agreement shall be suspended, dismissed, demoted or disciplined without just and sufficient cause, Any employee claiming unjust suspension, dismissal, demotion or disciplining shall make his claim to the Union within three (3) days of the action by the Employer, otherwise no action shall be taken by the Union. Upon receipt of the employee's claim, the Union shall inform the Employer, and grievance procedure shall be instituted promptly. If it is found that an employee has been improperly disciplined, dismissed, demoted or suspended, the employee shall be reinstated without loss of rights or standing of any kind, and he shall receive his full wages for period in question.

3. In the event of a dispute arising in the case of contagious diseases, the City Health Officer of Los Angeles, California, shall be the final authority in determining the physical fitness of the employee.

4. In order that the Union may be aware of members violating rules, and be given an opportu-

Exhibit A—(Continued)

nity to help correct violations and aid in maintaining maximum efficiency, it is agreed that where the Employer finds it necessary to reprimand an employee, which may have serious results, the Employer shall reduce such reprimand to writing in triplicate, giving one copy to said employee, one to be mailed to the Union immediately, and one to be retained in the Employer's files.

5. Upon any instances of bad workmanship, misconduct, failure to follow instructions, or any breach of discipline, which cannot be handled informally, the management may then serve first and second written notices upon the individual in cases where immediate disciplinary action is not contemplated. Disciplinary notices shall be void after ninety (90) days, except in case of repetition of same [11] violation.

6. Upon the issuance of a third notice, or in a situation where immediate disciplinary action is contemplated, the management may request the employee to report to the office where the employee shall state in writing if a hearing is desired and shall thereupon leave the premises in an orderly fashion and without delay. If a hearing is not requested by the employee, nor by the Union within 24 hours, the employee, in case discharge is the penalty, shall have no further rights under this Agreement.

7. Any shop committee or other accredited representative of the Union shall have free approach to

Exhibit A—(Continued)

the Employer on all matters of common interest between the employees and the Employer arising out of their employment.

8. A duly authorized Union business representative shall be allowed free access to the employees during working hours. Such representative shall carry credentials to be displayed upon the request of the Employer. The Union agrees that such representative shall avoid visits during rush hours where possible, and shall not interfere unreasonably with production.

9. All disputed claims for overtime shall be regulated so that no injustice shall be done the Employer or employee. The Employer shall keep time cards, or time clock records relating to employees covered by this Agreement for checking of overtime, such records shall be made available to the Business Agent or authorized representative of the Union in case of dispute. Where no time clock is used, the Employer shall see to it that time card weekly records are signed by the Employee. It is agreed that the payroll records of the Employer relating to employees covered by this Agreement shall be made available for inspection to the authorized representative of the Union upon request.

10. The Employer agrees that immediately upon request he will furnish the Union with a list of all employees coming under the jurisdiction of this [12] Agreement.

* * *

Exhibit A—(Continued)

Article X.

Work Week

1. It is agreed that forty (40) hours shall constitute the work week, except as hereinafter provided, eight (8) hours to be worked as follows: Monday, Tuesday, Wednesday, Thursday and Friday or Sunday night through Thursday night, inclusive. Staggered shifts will be allowed for corral men.

2a. The guaranteed work week shall be forty (40) hours Monday through Friday, inclusive.

2b. Employees laid off and called back to work the week immediately following the week of the layoff shall be guaranteed their full week's pay. If employees are called back the second week or later, they shall be guaranteed pay for the day they are called back and the balance of the days in that week.

3. Overtime hours shall not be used in computing the guaranteed work week.

4. There shall be no split shifts.

5. Work on Saturdays, Sundays or Holidays shall not be permitted except in the case of emergency, such work shall be voluntary. Employees should be notified not later than Thursday if [13] possible.

Exhibit A—(Continued)

Article XI.

Wages

Section 1

1. All extra employees shall be guaranteed an eight (8) hour day, and ten cents (.10c) per hour over the prevailing rates of the contract for regular employees. Overtime shall start at the end of the eighth hour worked in any one day. Extra employees working any part of their day between the hours of 6 p.m. and 6 a.m. shall be governed by the regular clause covering such hours.

2. All employees working any portion of his or (her) regular shift between the hours of 6 p.m. and 6 a.m. shall be paid ten cents (.10c) per hour above their regular rate of pay.

3. Casual night employees will be paid ten cents (.10c) per hour above the regular rate on a daily basis.

4. Overtime at the rate of time and one-half (1½) shall be paid after eight (8) hours in any one day, and after forty (40) hours in any one week. All overtime shall be voluntary.

5. Time and one-half (1½) shall be paid for all work performed on Saturday.

6. Double time shall be paid for all work performed on Sundays.

Exhibit A—(Continued)

7. Pay check stubs shall show rate of pay, straight time and overtime hours worked, and deductions.

Section 2

See page 8 for wage rates.

Article XII.

Arbitration

1. Under the terms of this Agreement there shall be no cessation of work either by strikes or lockouts, and any and all grievances that cannot be amicably adjusted between the Union Representative and the Employer shall be referred to an impartial board for arbitration. The Arbitration Board shall consist of two (2) selected by the Employer, two (2) by the Union, and one (1) Impartial Chairman to be agreed upon between those representing the Employer and the Union. In the event of failure to agree upon an impartial chairman within a single meeting of the parties, he shall be selected by the American Arbitration Association submitting the names of seven (7) available Arbitrators of which the Employer and the Union shall each eliminate three (3).

2. The findings of the Arbitration Board shall be final and binding upon both the Union and the Employer and neither shall attempt to evade putting such findings into effect promptly.

Exhibit A—(Continued)

3. The Company and the Union shall share equally the expense of the impartial arbiter. A decision must be rendered within fifteen (15) days from time of submission unless otherwise mutually agreed to by the Employer and the Union.

4. In the event arbitration is requested by either party in writing, said arbitration arrangements shall be made and submitted to the Arbiter within thirty (30) days from date of written notice. [14]

* * *

Article XIV.

1. No member shall be unfavorably affected in wages or conditions by the adoption of this Agreement. Members working by the week, as well as those securing more than the scale, shall receive all benefits of this Agreement.

* * *

Article XVI.

Termination

1. Except as listed below, this Agreement shall take effect March 1, 1951, and continue in effect until March 1, 1956, and from year to year thereafter unless terminated by either party giving written notice of termination by registered mail to the other not less than sixty (60) days prior to March 1, 1956, and/or March 1 of any year thereafter .

2. This Agreement may be opened annually for

Exhibit A—(Continued)

negotiations of weekly rates of pay and hours only, by either party giving notice to the other party not less than sixty (60) days prior to March 1, of any year. If either party opens this Agreement for adjustments, the provisions herein shall continue in full force and effect until the new Agreement is signed which shall become effective as of the anniversary date.

Signed for the Union:

[Seal] /s/ R. S. GRAHAM.

Signed for the Employer:

MEAT PACKERS
INCORPORATED. [18]

Date: January 24th, 1951.

Letter of Understanding for 1951-1956 Agreement

In the event that the Labor Management Relations Act of 1947 is amended, modified, or repealed so as to permit the incorporation herein of provisions contained in Article I, Sections 2, 4, 5, and 6 of the Agreement between the parties dated March 1, 1946, to March 1, 1951, and such is otherwise proper under the law, said provision shall be automatically incorporated herein at such time as the law permits.

Exhibit A—(Continued)

Signed for the Union:

[Seal] /s/ R. S. GRAHAM.

Signed for the Employer:

MEAT PACKERS
INCORPORATED,

/s/ BOB CAMPLER,
Pres.

Duly verified.

[Endorsed]: Filed June 2, 1954. [19]

[Title of District Court and Cause.]

MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY ALL PROCEEDINGS PENDING ARBITRATION

To the Plaintiff and its Counsel:

Please Take Notice that on July 19, 1954, at the hour of 10:00 o'clock a.m., the defendant will move the above-entitled Court to dismiss the above cause on the ground that the complaint does not state a claim or cause of action, or, in the alternative, the defendant will move the Court to stay all further proceedings herein until arbitration is had.

This motion is based upon the complaint herein and the points and authorities attached hereto.

Dated: June 8, 1954.

/s/ DAVID SOKOL,
Attorney for Defendant. [21]

Points and Authorities

I.

The Complaint Does Not State a Cause of Action.

The complaint on its face shows that there is a collective bargaining agreement between the parties. The agreement does not give exclusive authority to the employer as to the amount of the work to be done by each employee. Furthermore, from the face of the complaint, it appears that the employer has acquiesced in the alleged practices for almost two years; it has not discharged any employees for allegedly failing to perform their tasks; and does not allege that the Union, its representatives and members, did not have the right, under the collective bargaining agreement, to do what it is alleged they did do.

II.

The Court, Pursuant to Sec. 3 of Title 9, of the United States Code Entitled "Arbitration," Should Stay All Further Proceedings.

Sec. 3 provides as follows.

"Stay of proceedings where issue therein referable to arbitration.

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing

for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." [22]

The plaintiff brought this action under Sec. 301 of the Taft-Hartley Act against the defendant Union for damages and breach of contract. The breach allegedly is a cutting down of work by the employee members of the Union. The agreement contains an arbitration clause in Article XII.

Section 3 of Title 9 is applicable to a collective bargaining agreement between the parties such as is involved herein. Tenney Engineering vs. United Electrical Workers, 207 F. (2d) 450.

Accordingly, under Sec. 3 of Title 9, the Court, upon being satisfied that the issue involved is referable to arbitration, should stay further proceedings.

If the contention of the plaintiff is as alleged in the complaint, the matter is one for arbitration, in view of the fact that a dispute has arisen between the parties as to how much work the plaintiff's employees should do. This is clearly a grievance subject to the arbitration machinery.

However, since the plaintiff has not alleged any

attempt to arbitrate this matter, the cause should be dismissed.

Respectfully submitted,

/s/ DAVID SOKOL,
Attorney for Defendant.

[Endorsed]: Filed June 9, 1954. [23]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This is an action brought by the employer for damages for breach of a collective bargaining contract. Plaintiff, a meat packing concern, sues the labor union representing the company's employees. The suit is brought pursuant to provisions of Section 301 of the Labor-Management Relations Act of 1947 (Title 29, U.S.C.A., § 185). The Company alleges that the Union has breached the contract by issuing directives and instructions to the employees to engage in an organized reduction of output which has caused substantial losses to the Company.

The Union now moves to dismiss the action or, in the alternative, to stay all proceedings pending arbitration. [25]

The motion to dismiss is based on three grounds. (1) That the agreement does not give exclusive authority to the employer as to the amount of work to be done by each employee; (2) that it appears from the complaint that the employer has acquiesced in

the alleged practices for almost two years, not having discharged any employees for failing to perform their tasks; and (3) that the complaint does not allege that the Union did not have the right, under the contract, to do the acts allegedly breaching the contract.

Upon consideration of the memoranda submitted and the oral arguments presented, the motion to dismiss is denied.

The motion to stay all proceedings pending arbitration is expressly submitted pursuant to Title 9 of the United States Code. Section 3 of that Title provides for a stay of any suit or proceeding upon an issue which is, by terms of a written agreement, referable to arbitration. Without deciding whether or not the issue involved in this action is, under the terms of the contract, an issue referable to arbitration, it is the opinion of the Court that the Arbitration Act specifically excludes the contract involved in this action.

The Arbitration Act was passed as a single unit. (Act February 12, 1925, c. 213, 43 Stat. 883). Section 1 of the Act, after defining certain words, states:

> "* * * nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

It is the Company's contention that this clause removes the contract involved in this action from the Act. The Union [26] contends (a) That the phrase

"contracts of employment" does not cover collective bargaining agreements; and (b) that the employees involved in this contract are not a "class of workers engaged in interstate commerce."

On consideration of the Act in its entirety and examination of its legislative history,[1] and in view of the obvious purpose and intent of other subsequent labor legislation,[2] it is the opinion of the Court that the contract here involved is within the exception clause of the Arbitration Act and, therefore, the Act is inapplicable to the matter at bar. Gatliff Coal Co. vs. Cox, 142 F. 2d 876 (6th, 1944); International Union vs. Colonial Hardwood Floor Co., 168 F. 2d 33 (4th, 1948); Mercury Oil Refining Co. vs. Oil Workers International Union, CIO, 187 F. 2d 980 (10th, 1951).

Counsel for plaintiff shall submit an order of denial of the motion to dismiss or stay proceedings.

Dated: August 6, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed August 6, 1954. [27]

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[1]XLVI A.B.A. Rep. 359 (1921); XVIII A.B.A. Rep. 287 (1923); Gordon, International Aspects of Trade Arbitration, 11 A.B.A.J. 717 (1925); 28 N.C. Law Rev. 225, 227 (1950).

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[2]e.g. Railway Labor Act, Title 45 U.S.C.A. § 157; 29 U.S.C.A. § 108.

In the District Court of the United States, Southern District of California, Central Division

No. 16818-T

COMMERCIAL PACKING CO., INC.,

Plaintiff,

vs.

BUTCHERS UNION LOCAL 563, Affiliated With Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Defendant.

ORDER

This cause came on to be heard on the Motions of defendant to dismiss the Complaint herein and in the alternative to stay these proceedings pending arbitration, and it appearing to the court that these motions should be denied, it is

Ordered, that the defendant's Motion to Dismiss be, and it is hereby, denied;

It Is Further Ordered, that the defendant's Motion to Stay these Proceedings Pending Arbitration be, and it is hereby, denied.

The defendant shall have fifteen (15) days within which to file its answer to the Complaint herein.

Dated: August 16, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to Form:

DAVID SOKOL,

By /s/ FRED ROTHFARD,
Attorney for Defendant.

Lodged August 13. 1954.

[Endorsed]: Filed August 17, 1954. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court, to the Plaintiff Above Named, and to its Attorney, Milton S. Tyre, Esq.:

Notice is hereby given that the defendant in the above-entitled action hereby appeals to the Circuit Court for the 9th Circuit from the Order of the above-entitled Court entered the 17th day of August, 1954, herein, denying defendant's Motion to stay these proceedings pending arbitration.

Dated: August 20, 1954.

/s/ DAVID SOKOL,
Attorney for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed August 23, 1954. [29]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 32, inclusive, contain the original Complaint; Motion to Dismiss or in the Alternative to Stay all Proceedings Pending Arbitration; Memorandum of Decision; Order; Notice of Appeal; Statement of Points and Designation of Record on Appeal which constitute the transcript of record on Appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 3rd day of September, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy. [30]

[Endorsed]: No. 14,502. United States Court of Appeals for the Ninth Circuit. Butchers Union Local No. 563, Affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor, Appellant, vs. Commercial Packing Company, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 7, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
No. 14502

BUTCHERS UNION LOCAL 563, Affiliated With Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

COMMERCIAL PACKING CO., INC.,

Appellee.

APPELLANT'S STATEMENT OF POINTS

To the Clerk of the Above-Entitled Court, to the Appellee Above Named, and to Milton S. Tyre, Esquire, its Attorney:

The following is the concise Statement of Points upon which Appellant intends to rely on the appeal herein:

I.

The trial Court erred in denying Appellant's Motion to Stay the Proceedings pending arbitration.

II.

The trial Court erred in ruling that the contract involved herein is within the exception clause of the Arbitration Act, and that therefore the Act was inapplicable to the matter at bar.

Dated: September 8th, 1954.

/s/ DAVID SOKOL,
Attorney for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 9, 1954.

No. 14502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BUTCHERS UNION LOCAL No. 563, Affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

COMMERCIAL PACKING COMPANY, INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

DAVID SOKOL,
354 South Spring Street,
Los Angeles 13, California
Attorney for Appellant.

FRED ROTHFARB,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BUTCHERS UNION LOCAL No. 563, Affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

COMMERCIAL PACKING COMPANY, INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction and Facts.

This is an appeal from a decision of the Honorable Ernest A. Tolin, United States District Judge, denying the motion of the appellant for a stay of all proceedings, pending arbitration, as provided by Section 3 of Title 9 of the United States Code.

Appellee, a meat packing concern, brought suit against the appellant, a labor union representing the Company's employees, pursuant to the provisions of Section 301 of the Labor Management Relations Act of 1947 (Title 29, U. S. C. A., Sec. 185). The Company alleged that the

Union had breached the collective bargaining agreement previously entered into between the Company and the Union by instructing their employees to limit their rate of output, which, it was alleged, had caused substantial losses to the Company [R. 3].

The Union moved to dismiss the action or, in the alternative, to stay all proceedings pending arbitration [R. 23].

The motion to stay all proceedings pending arbitration was expressly submitted, pursuant to Title 9 of the United States Code. Section 3 of that title provides for a stay of any suit or proceeding upon an issue which, by terms of written agreement, is referable to arbitration.

The District Court held that the agreement herein involved was within the exception clause of the Arbitration Act, and therefore that the Act was inapplicable to the matter at bar [R. 28].

By an Order dated August 16, 1954, the District Court denied the appellant's motion to stay proceedings pending arbitration [R. 29].

Notice of appeal was filed by the appellant on August 23, 1954 [R. 30].

This Court's jurisdiction to review is not questioned.

ARGUMENT.

POINT I.

The Order of the District Court Denying the Motion to Stay All Proceedings Pending Arbitration Is an Appealable Order.

The order is an appealable interlocutory order within the provisions of 28 U. S. C. A., Sec. 1292.

Shanferoke Coal and Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313 (1934);

Gatliff Coal Co. v. Cox, 142 F. 2d 876 (C. C. A. 6th, 1944).

POINT II.

The Motion to Stay All Proceedings Pending Arbitration Was Improperly Denied.

(a) The Collective Agreement Entered Into Between the Parties Not Being a "Contract of Employment," Is Not Excepted From the Applicability of the Arbitration Act.

Section 3 of the United States Arbitration Act (Act, Feb. 12, 1925, c. 213, 43 Stat. 883) permits federal courts to grant stays pending arbitration in suits involving issues made arbitrable under written agreements. The Act sanctions written arbitration agreements and gives federal courts power to compel arbitration under them.

Section 1 of that Act, after defining certain words, states:

> "* * * nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

In denying the motion of the Union to stay all proceedings pending arbitration the Court below held that the agreement here involved was within the exception clause of the Arbitration Act, and therefore, the Act is inapplicable to the matter at bar.

As support for its ruling the Court cited three decisions, as follows: *Gatliff Coal Co. v. Cox,* 142 F. 2d 876 (6th, 1944); *International Union v. Colonial Hardwood Floor Co.,* 168 F. 2d 33 (4th, 1948); *Mercury Oil Refining Co. v. Oil Workers International Union, C. I. O.,* 187 F. 2d 980 (10th, 1951).

The leading case on the point is the *Gatliff* case, *supra*; in that case, an individual employee sued for wages due him under a collective bargaining agreement, the employer moved to stay the action pending arbitration under the contract. The trial court refused the stay, and the Sixth Circuit concurred on the ground that the Act did not apply to "contracts of employment."

It is to be noted, however, that the Court did not say that a collective bargaining agreement is "a contract of employment." It is as the unfortunate result of later decisions by other courts which misconstrued the *Gatliff* opinion and treated that decision as though it had said that collective agreements were "contracts of employment." that we are now confronted with the issue in the instant case.

Thus, in *International Union v. Colonial Hardwood Flooring Company,* 168 F. 2d 33 (C. C. A. 4, 1948), the Court denied the defendant's motion for a stay of proceedings pending arbitration, citing *Gatliff*. A reading of the *Colonial* opinion indicates that the Court did not consider at length the question of the distinction between "con-

tracts of employment" as used in the Arbitration Act and a collective bargaining agreement. In any event, the Court found that the arbitration clause in the agreement in that case had relation to controversies which were made the subject of grievance procedure and not to claims for damages on account of strikes or secondary boycotts. In the *Colonial* case the plaintiff had sued to recover damages on account of a strike in violation of the provisions of the contract, and a secondary boycott. On the facts, the holding in *Colonial,* therefore, was correct.

The third case cited by the District Court below, *Mercury Oil Refining Co. v. Oil Workers International Union, C. I. O., supra,* did not discuss the question at all. It merely cited the *Gatliff* and *Colonial* cases, stating that:

> "Labor contracts are specifically excluded from the Federal Arbitration Act."

However, the Sixth Circuit, in the recent case of *Hoover Motor Express Company, Inc. v. Teamsters, et al.,* 217 F. 2d 49 (1954), has now clarified its earlier language in *Gatliff* and has held that the exclusion clause of Section 1 of the Arbitration Act does not apply to a collective bargaining contract, which it found to be a trade agreement rather than a "contract of employment" within the meaning of the statutory exclusion clause which excludes "contracts of employment."

The Court there said:

> "While the Gatliff case has been cited by other courts (*Cf.,* Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc., 192 F. 2d 310 (C. A. 3), and International Union United Furniture Workers v. Colonial Flooring Co., Inc., 168 F. 2d

33 (C. A. 4)), for the proposition that a collective bargaining agreement is a contract of employment, we think these misconstrue the Gatliff holding, which on its facts simply supports the doctrine that an individual hiring for wages falls within the exception."

That a collective bargaining agreement is a trade agreement and not a contract of employment is not a proposition new to the law. In *J. I. Case Co. v. National Labor Relations Board,* 321 U. S. 332, the very issue was there decided, the Court stating:

> "The agreement in question is a collective labor agreement, and, as such, is not a 'contract of employment.'
>
> > 'Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. * * * After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. * * *.'"

And, in the *Hoover* case, *supra,* the Court said:

> "The exception in Section 1 of the Arbitration Act we think was intended to avoid the specific performance of contracts for personal services and not to apply to collective labor agreements. Lewittes &

Sons v. United Furniture Workers of America, 95 Fed. Supp. 851, 855, 27 LRRM 2490. The hiring of the individual workmen who are employed in accordance with the collective trade agreement is the contract of employment. United Office & Professional Workers of America v. Monumental Life Insurance Co., 88 Fed. Supp. 602, 13 L. A. 1007. *Cf.,* J. I. Case Co. v. N. L. R B, *supra,* 334; Lewittes & Sons v. United Furniture Workers of America, *supra.*"

Similarly, in the case of *Lewittes & Sons v. United Furniture Workers of America, C. I. O.,* 95 Fed. Supp. 851 (D. C. S. N. Y., 1951), the Court said:

"The exception in Section 1 was intended to avoid the specific performance of contracts for personal services in accordance with the traditional judicial reluctance to direct the enforcement of such contracts and it was not intended to apply to collective labor agreements. United Office & Professional Workers of America, C. I. O. v. Monumental Life Insurance Company, 88 Fed. Supp. 602.

"The purpose of the Labor-Management Relations Act of 1947, 29 U. S. C. A. 141 *et seq.,* is to bring about peaceful solutions of labor disputes without recourse to industrial strife. Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to the use of economic force or pressures, their agreements should be liberally construed with a view toward the encouragement of arbitration. Kulukundis Shipping Co. v. Amtorg Trading Corp. [126 F. 2d 978].

"The Courts should be reluctant 'to strike down a clause which appears to promote peaceful labor relations rather than otherwise.' Shirley-Herman

Co. v. International Hod Carriers [182 F. 2d 806]. The granting of a stay through the interpretation here placed upon the Arbitration Act is in accordance with these policies."

(b) The Employees in the Instant Case Are Not "a Class of Workers Engaged in Interstate Commerce" Within the Meaning of the Exception Clause of the Arbitration Act.

The question here was squarely presented and decided for the first time in *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America (U. E.) Local 437,* 207 F. 2d 450 (C. A. 3, 1953), where that Court, speaking through Judge Maris, said:

> "We think that the intent of the latter language was, under the rule of *ejusdem generis,* to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers."

It is significant that the Arbitration Act does not use terms such as "affecting commerce" (Taft-Hartley Act), or "in the production of goods for commerce" (Fair Labor Standards Act).

In this case the appellee's employees are engaged in the production of goods for subsequent sale in interstate commerce. Thus, while their activities will undoubtedly affect interstate commerce, they are not acting directly

in the channels of commerce itself. They are, therefore, not a "class of workers engaged in foreign or interstate commerce" within the meaning of Section 1 of Title 9.

To the same effect:

Harris Hub & Spring Co. v. U. E., 121 Fed. Supp. 40 (1954).

Although the Third Circuit had previously been of the view that collective agreements were to be viewed as "contracts of employment" and therefore excluded from the scope of the Arbitration Act (*Amalgamated Association of Street Electric Railway Workers v. Pennsylvania Greyhound Lines, Inc.,* 192 F. 2d 310), the effect of its recent *Tenney* decision has been to restrict the significance of its former position. However, in the *Tenney* case, Chief Judge Biggs, in writing the opinion of the concurring Judges, stated:

> "This Court should expressly overrule its decision . . . holding that a collective bargaining agreement is a 'contract of employment' within the purview of Section 1 of the Act . . . Judge Maris (who wrote the majority opinion) has authorized me to say that he agrees with me that a collective bargaining agreement is not a 'contract of employment' . . . properly interpreted."

(c) The Statute Is Plain and Unambiguous.

To reject literal interpretation of statutory language, there must be something to make plain the intent of the Legislature that the letter of the statute is not to prevail.

De Ruiz v. De Ruiz, 88 F. 2d 752.

The proponents of the view that the Arbitration Act was not designed to include collective agreements within

its scope base their argument upon an alleged intent of Congress to make the Act applicable only to instances of commercial arbitration.

In discussing the legislative history of the Arbitration Act the Court, in the *Tenney* case, *supra,* at page 452, noted that:

> "The only reference to the clause in question appears in a report of the Bar Association committee in which it was stated:
>
> " 'Objections to the bill were urged by Mr. Andrew Furseth as representing the Seamen's Union, Mr. Furseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." ' "

Discussing the sparse legislative history the Court concluded that:

> "The legislative history furnishes little light on this point."

And Chief Judge Biggs, in a concurring opinion stated at page 455 that:

> "I cannot accept the plaintiff's contention that the legislative history of the Act compels the conclusion that the Act was intended to apply to commercial disputes and not to labor disputes. The legislative history is of a kind that possesses little weight and should not be considered. *Duplex Printing Press Co. v. Deering* (1921), 254 U. S. 443, 474, 41 S. Ct. 172, 65 L. Ed. 349, and *United States v. King Chen*

Fur Co. (1951), 188 F. 2d 577, 584, 38 Cust. & Pat. App. 107. The face of the statute must control the relief to be granted under it."

Substantially the same question was presented to the California Supreme Court in *Levy v. Superior Court,* 15 Cal. 2d 692 (1940). In that case it was held that a collective bargaining agreement was not excepted from the provisions of the California Arbitration Law (Code Civ. Proc., Secs. 1280-1293), the Court holding that a collective agreement was not a contract "pertaining to labor" within the meaning of the provisions of Section 1280 of the Code of Civil Procedure. The Court pointed out that:

"The respondents present no legislative history which indicates that the proviso was inserted in Section 1280 for the purpose of excluding collective bargaining contracts. The bill introducing the measure without the proviso was before the Assembly in January, 1927, designated as Assembly Bill No. 460. The proviso was inserted by amendment in the committee on March 1, 1927. It is asserted that in the movement for uniform state legislation on arbitration, both commercial and industrial, a form of State Arbitration Act contained the proviso that 'the provisions of this Act shall not apply to collective contracts between employers and employees, or between employers and associations of employees, in respect to terms or conditions of employment,' and that such a draft was tendered to the California legislature in 1927. It is stated that such a provision has been included in the statutes of Arizona, New Hampshire, Rhode Island and Oregon. The respondents argue that by the omission of such specific provision from the California statute and the use of the proviso excluding contracts 'pertaining to

> labor,' the legislature intended also to exclude collective bargaining contracts. But it would seem more reasonable to expect a specific provision to that effect if the legislature intended to exclude collective bargaining contracts from the operation of the statute."

As was pointed out by the California Court in the *Levy* case, would it not have seemed more reasonable to expect a specific provision to that effect if the Congress had intended to exclude collective bargaining contracts from the operation of the Federal Arbitration Act?

Conclusion.

We feel that the weight of authority indicates that the collective bargaining agreement is not excluded from the provisions of the Arbitration Act.

In the instant matter before the Court there is no claim that there was a strike or a work stoppage. The only claim made is that the Union instructed and urged the employees to control the work load, still continuing to do the regular work.

We, therefore, have a situation where employee members of the Union are abiding by the Contract and are performing their labor; the only issue being that Appellee claims that they should do more work.

This is precisely the situation that calls for Arbitration.

Respectfully submitted,
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FRED ROTHFARB,
Of Counsel.

No. 14502.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BUTCHERS UNION LOCAL No. 563, Affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

COMMERCIAL PACKING COMPANY, INC.,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Jurisdiction of the District Court.

This action was commenced by the Appellee, hereinafter sometimes referred to as "Company," against the Appellant, hereinafter sometimes referred to as "Union," under Section 301 of the Labor-Management Relations Act of 1947, 29 U. S. C. Sec. 185, commonly referred to as the Taft-Hartley Act [R. 3]. The Union moved to stay all proceedings pending arbitration pursuant to Section 3 of the United States Arbitration Act, 9 U. S. C. Sec. 3 [R. 23]. The District Court denied the Union's motion [R. 29].

Jurisdiction of This Court.

This court does *not* have jurisdiction of an appeal from the denial of the Union's motion to stay proceedings pending arbitration under Section 3 of the United States Arbitration Act. The order of denial is not an appealable interlocutory order under 28 U. S. C. Sec. 1292, particularly since this record fails to show that the Union is raising an equitable defense to the Company's action.

Schoenamsgruber v. Hamburg American Line, 70 F. 2d 234, 236 (9th Cir. 1934) aff'd. 294 U. S. 454, 456 (1935);

Continental Grain Co. v. Dant & Russell, Inc., 118 F. 2d 967, 968 (9th Cir., 1941).

See:

Baltimore Contractors, Inc. v. Bodinger, —U. S.—, 99 L. Ed. (Adv. p. 171, 1955).

Statute Involved.

The provisions of the United States Arbitration Act (Act of Feb. 12, 1925, C. 213, as enacted into positive law by Act of July 30, 1947, C. 392, 9 U. S. C. Secs. 1-14) which are pertinent to this proceeding provide:

"Sec. 1. . . . 'commerce,' as herein defined, means commence among the several States . . ., *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.* (Emphasis added.)

"Sec. 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and en-

forceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court* in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,* shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (Emphasis added.)

"Sec. 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate . . . may petition any court of the United States . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . upon being satisfied . . . the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

Pleadings Showing the Existence of Jurisdiction.

The Company operates a large meat packing plant in Los Angeles, California. In its complaint it alleged as follows:

> The Company annually ships to points outside the State of California and annually imports from states outside the State of California merchandise with a value in excess of $1,000,000.00, thereby coming within the meaning of "commerce" as used in the Taft-Hartley Act [R. 4]. The Company and the Union entered into a written collective bargaining

agreement covering the wages, hours and working conditions of the Company's production employees [R. 5]. This agreement is now and will remain in effect until March 1, 1956 [R. 6]. On or about January 31, 1952 the Union, without any cause or provocation and without the permission or consent of the Company, issued directions to its members employed by the Company to slowdown and thereby reduce their daily production to an amount arbitrarily determined by the Union. This arbitrary reduction of production was known as "controlled kill" [R. 6-7]. As a direct result of controlled kill, the Company has sustained damages in the sum of $534,-759.20 through April 30, 1954 and such further sum as may be incurred from and after said date to the trial date of this action [R. 10].

Article VII of the collective bargaining agreement between the parties contains a grievance procedure [R. 15], and Article XII provides for the arbitration of grievances [R. 20].

The Union moved to dismiss the action or in the alternative to stay all proceedings pending arbitration [R. 23].

The district court denied the motion to dismiss [R. 27]. No appeal has been taken from such denial. The basis of the district court's denial was that the contract involved herein was expressly excluded from the operation of the United States Arbitration Act [R. 27].

Questions Presented.

1. Can an action for breach of a collective bargaining agreement covering workers engaged in the production of goods for interstate commerce be stayed pending arbitration under the provisions of Section 3 of the United States Arbitration Act?

2. Even if the United States Arbitration Act were applicable to the action described in the above question, can the issue presented by the pleadings herein be referred to arbitration under the Act?

Summary of Argument.

The Company's suit can be stayed pending arbitration by a federal court only under Section 3 of the United States Arbitration Act. However, there is excepted from the Act "contracts of employment . . . of workers engaged in . . . interstate commerce." The legislative history of the Act shows that the purpose of Congress was to frame a commercial rather than a labor arbitration act. From its language and from its obvious purpose, it is, therefore, concluded that collective bargaining contracts are excluded from the Act as "contracts of employment."

Even if this court should hold that collective bargaining agreements are not excluded from the operation of the Arbitration Act, the Union's motion to stay must be denied. Under Section 3 a federal court is empowered to stay a suit on a contract containing an arbitration clause only if the suit involves an issue "referable to arbitration" under the contract. The contract between the parties provides that only "grievances" are arbitrable. Under the contract the Company has no right to file a grievance, nor is the issue of its damages arising out of the Union's breach an arbitrable issue. It follows that the sole recourse of the Company is in the courts, and that the lower court was correct in so holding.

ARGUMENT.

I.

The Company's Action for Damages Cannot Be Stayed Under Section 3 of the United States Arbitration Act Because the Contract Between the Parties Is Expressly Excluded From the Operation of the Act by Section 1 Thereof.

The answer to the first issue posed above turns on the meaning of the exclusionary clause of the United States Arbitration Act which reads:

> "But nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Page 9 of Appellant's Opening Brief makes the point that "the statute is plain and unambiguous." Unfortunately, the courts have not so found it. The major portion of Appellant's Opening Brief belies this statement, and a substantial portion of this brief will also discuss the meaning of the exclusionary clause.

The circuit courts who have heretofore considered this problem have taken three different positions: The Sixth and Tenth Circuits have held that collective bargaining agreements are excluded from the operation of the Arbitration Act. The Third Circuit has taken a middle ground holding that collective bargaining agreements are excluded from the operation of the Act, but that those collective bargaining agreements which cover workers engaged in the production of goods for interstate sale are not so excluded. The Fourth Circuit has held that collective bargaining agreements are not excluded from the operation of the Act.

A. The Exclusionary Clause Applies to the Entire Arbitration Act.

Appellee urges adoption of the theory of *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.,* 168 F. 2d 33 (4th Cir. 1948), which held that collective bargaining agreements covering workers engaged in the production of goods for interstate sale are excluded from the operation of the Act. There the Union appealed from an order refusing a stay of proceedings brought by the Company under Sections 301 and 303 of the Taft-Hartley Act to recover damages resulting from a strike in violation of the contract and a secondary boycott. Judge Parker, speaking for a unanimous court, stated:

> "And we think, also, that the learned District Judge was correct in holding that the provisions of the United States Arbitration Act may not be applied to this contract, because it is a contract relating to the employment of workers engaged in interstate commerce, within the clear meaning of the exclusion clause contained in the first section. This is not to say, of course, that such workers and their employers may not agree to arbitrate their differences, but merely that the provisions of the United States Arbitration Act do not apply to their agreements. . . . we think it clear that the excepting clause was intended to apply to the entire act. This becomes even clearer when reference is made to the statute as originally enacted, where the portion containing the definitions and exception is not separately numbered but is manifestly intended to apply to the statute as a whole (43 Stat. 883).
>
> ". . . It is perfectly clear, we think, that it was the intention of Congress to exclude contracts

of employment from the operation of all of these provisions. Congress was steering clear of compulsory arbitration of labor disputes, and unless the excepting clause which we have italicized is applied to the entire act, and not confined to the first section, section 4 would give the court power to force arbitration in any agreement providing for arbitration where there is jurisdiction because of diversity of citizenship or other reasons. Of course, if the excepting clause applies to section 4, it applies also to section 3; for the only alternative to applying it to the entire act is to limit it to section 1. The effect of limiting the excepting clause to section 1 would be merely to exclude employment contracts from maritime transactions and transactions in commerce as defined in the act, so that these would not come within the arbitration agreements made valid and enforceable by section 2, but would leave them, if otherwise valid, to be enforced under the provisions of section 4, the provisions of which are not limited to maritime transactions or transactions in commerce. Whether regard be had to the language of the statute, therefore, or to its reason and spirit and the evident purpose of the excepting clause, it is clear that it is applicable to the entire statute and not merely to the definitions of maritime transactions and commerce."

A unanimous Tenth Circuit followed the *Colonial Hardwood* case in *Mercury Oil Refining Co. v. Oil Workers Union, CIO,* 187 F. 2d 980, 983 (1951), in applying the Act to a collective bargaining agreement.

The Sixth Circuit has in effect reversed the position it took in *Gatliff Coal Co. v. Cox,* 142 F. 2d 876 (1944), in its recent *Hoover Motor Express Co. v. Teamsters*

Union, AFL decision, 217 F. 2d 49 (1954). The *Hoover Motor* case will be discussed hereinbelow, and although the Sixth Circuit now states that subsequent circuits "misconstrued" the *Gatliff* holding, we submit that the reasoning of the *Gatliff* case is still pursuasive.

Gatliff was an action brought by an employee against the defendant coal company seeking a sum which he alleged was due him as wages under the collective bargaining agreement between a coal operators' association and the United Mine Workers of America. Although the court did not expressly state that a collective bargaining agreement was a contract of employment within the meaning of the Arbitration Act, this view was implicit in its decision. The court did say, "Since Appellee was employed by Appellant at the time the collective agreement was entered into . . . and . . . continued in the employ of Appellant . . . *Appellee's rights* arising out of his employment by Appellant and the wages due him, if any, *must be measured by the collective agreement.*" (Emphasis added.)

The Sixth Circuit, then composed of Judges Hamilton, Martin and McAllister, unanimously stated as follows in denying the Company's motion for stay:

> "The office of an exception in a statute is well understood. It is intended to except something from the operative effect of a statute or to qualify or restrain the generality of the substantive enactment to which it is attached and it is not necessarily limited to the section of the statute immediately following or preceding. The scope of the exception or proviso in the statute must be gathered from a view of the whole law, and if the language of the exception is in perfect harmony with the general scope of the

entire statute, the exclusion is applicable to the whole act. It is clear that the exception here in question was deliberately worded by the Congress to exclude from the National Arbitration Act all contracts of employment of workers engaged in interstate commerce. Section 2 of the Act makes valid and irrevocable all arbitration agreements in writing to submit to arbitration future controversies arising out of the contract of which the arbitration agreement was a part. It would be senseless to say that the exclusion from the Act covers the validity of the contract, but excludes the stay provision of Section 3. The reason for the exclusion is applicable to the entire act. The language of the exclusion 'herein contained' is found in the first section of the Act. This section is made up entirely of definitions and exceptions to the operation of the title. 'Herein' as used in legal phraseology is a locative adverb and its meaning is to be determined by the context. It may refer to the section, the chapter or the entire enactment in which it is used. The fact that it was used in the present Act in a section where none of the substantive matter set up in the succeeding sections of the Act appeared must mean that it is to be applied to the whole Act and not to any given section."

The most recent Third Circuit holding on this particular point is in accord. (*Tenney Engineering, Inc. v. United Electrical Workers,* 207 F. 2d 450 (1953).)

The Third Circuit, however, has vascillated in its approach to this problem. In *Donahue v. Susquehanna Collieries Co.,* 138 F. 2d 3 (1943); *Watkins v. Hudson Coal Co.,* 151 F. 2d 311 (1945), cert. denied, 327 U. S. 777 (1946); *Donahue v. Susquehanna Collieries Co.,* 160 F. 2d 661 (1947), and *Evans v. Hudson Coal Co.,* 165 F. 2d 970 (1948), the Third Circuit had held that Section 1 of

the Act related to Section 2 only and had no application to motions for stay authorized by Section 3.

Subsequently the Third Circuit reconsidered the issue and reversed its earlier position holding that the exclusionary clause pertained to the entire Arbitration Act.

Amalgamated Ass'n Street Employees v. Pennsylvania Greyhound Lines, 192 F. 2d 310 (1951);

Pennsylvania Greyhound Lines v. Amalgamated Ass'n Street Employees, 193 F. 2d 327 (1952).

In *Tenney, supra,* the Third Circuit reaffirmed its position that the exclusionary clause is a limitation upon the operation of all sections of the Act citing *Gatliff, Colonial Hardwood* and *Pennsylvania Greyhound, supra.*

Several district courts in the third circuit took their cues from the rule then in effect in that circuit, and as the higher court changed its position, the district courts followed.

Thus in *United Office & Professional Workers v. Monumental Life Inc. Co.,* 88 F. Supp. 602, 604 (E. D. Pa. 1950), the district judge stated that he was compelled to follow the general rule in effect in the third circuit at that time as announced by the *Donahue* and *Watkins* cases, *supra.*

By the same token the Delaware district court in *Ludlow Mfg. & Sales Co. v. Textile Workers Union, CIO,* 108 F. Supp. 45 (1952), was compelled to follow the *Pennsylvania Greyhound* decisions, *supra,* and to deny a motion for stay of proceedings although at the time the matter was argued the rule of *Donahue* and *Watkins* prevailed.

Other districts where there was no controlling circuit decision in effect chose conflicting precedents.

A New York district court in *Lewittes & Sons v. United Furniture Workers, CIO,* 95 F. Supp. 851 (1951), and cited in Brief of Appellants at pages 7 and 8, relied heavily upon the *Monumental Life* case, *supra.*

A California district court, on the other hand, followed the *Colonial Hardwood* case in *Matson Navigation v. National Union Marine Cooks and Stewards,* 22 L. R. R. M. 2138, 10 Lab. Arb. 932 (1948), appeal dismissed 171 F. 2d 179 (9th Cir. 1948).

At one point in time in the Arbitration Act's judicial interpretation the three circuits which had considered the exclusionary clause were in accord that it applied to the entire Act. (*Colonial Hardwood, Gatliff* and *Pennsylvania Greyhound* cases, *supra.*)

Thus the Massachusetts District Court in *Boston & Maine Transp. Co. v. Amalgamated Ass'n Street Employees,* 106 F. Supp. 334 (1952), had an easy task and pointed to the agreement of the circuits on this question in denying a motion for stay of proceedings pending arbitration.

With the decision of the *Mercury Oil* case, *supra,* in 1952, all four of the circuits which had discussed the exclusionary clause agreed that contracts of employment were excluded from the operation of the entire Arbitration Act including Section 3.

In a case note in 51 Mich. L. Rev. 117, 119 (1952), the author stated:

> "It now seems clear that there is no method under existing Federal legislation to enforce, directly or

indirectly, an agreement to arbitrate contained in a collective bargaining agreement. No doubt this result is deducted by the technical rules of statutory construction, the legislative history, and the context applicable to the Arbitration Act."

At present the *Hoover Motor* decision, *supra,* of the Fourth Circuit stands as the lone dissent.

B. A Collective Bargaining Agreement Is a Contract of Employment Within the Meaning of the Exclusionary Clause.

The greatest cause of conflict between the courts is whether a collective bargaining agreement is a contract of employment.

The authorities which state that it is not rely upon a statement taken out of context in *J. I. Case Co. v. NLRB,* 321 U. S. 332 (1944). *Case* is cited solely because of an isolated statement therein that the result of collective bargaining between a union and management is not necessarily a "contract of employment." (Brief for Appellant, p. 6.) Actually that case arose as follows: The employer entered into individual agreements with certain employees, which the NLRB found was a violation of the National Labor Relations Act. The NLRB had obtained a circuit court decree enforcing its order requiring the employer to cease and desist from giving effect to the individual contracts of employment and from making new ones. The writ was granted to review the Circuit Court's decree. The Court affirmed, and it was not necessary to such affirmance that any finding be made that a collective bargaining agreement was not a contract of employment.

What Justice Jackson had reference to in the above quoted statement was simply that the collective bargaining

agreement did not in and of itself give the worker a job. It merely set forth by contract between the union and the company the terms of employment under which each worker would work if, as and when hired. As a matter of fact, Mr. Justice Jackson carefully points out just before the reference quoted above as follows:

> "Contract in labor law is a term the implication of which must be determined from the connection in which it appears."*

The connection in which "contract of employment" appears in the United States Arbitration Act is wholly different from the problem which was before Mr. Justice Jackson in affirming the Seventh Circuit Court's decree enforcing the Board's order.

Certain authorities have neglected to examine into the implication of the term "contract of employment" in connection with its use in the Arbitration Act.

The most recent example is the *Hoover Motor* case, *supra,* where Justices Simons, Allen and Stewart of the Fourth Circuit, none of whom decided the *Gatliff* case, *supra,* emasculated that decision by stating that it had been "misconstrued." The court for its new position cited *Lewittes,* which in turn relied on *Monumental Life,* which in turn relied on *Donahue* and *Watkins,* which in turn were overruled.

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*See *Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 35 L. R. R. M. 2643 (U. S. Supreme Court, March 28, 1955), where Justice Frankfurter speaks of "the difficulties which originally plagued the courts called upon to identify the nature of the legal relations created by a collective contract" and cites in footnote 27 four different legal views on this subject.

Perhaps the entire discussion of the Arbitration Act in the *Hoover Motor* case should be disregarded since the opinion points out that the collective bargaining agreement between the parties did not contain an arbitration clause. Therefore any discussion of the Arbitration Act is mere dictum—a premature attempt by the court to bury *Gatliff* without the benefit of a corpse.

The fallacy of the *Hoover Motor, Lewittes* and *Monumental Life* cases in taking an isolated statement appearing in *Case* and applying it to the Arbitration Act has been pointed out by several able courts.

The Fourth Circuit was asked to reconsider and overrule its *Colonial Hardwood* decision in *United Electrical Workers v. Miller Metal Products, Inc.,* 215 F. 2d 221 (4th Cir. 1954). Although as pointed out at page 4 of Appellant's Opening Brief *Colonial Hardwood* had not expressly considered the distinction between contracts of employment as used in the Arbitration Act and collective bargaining agreements, this distinction was thoroughly discussed and rejected in the *Miller Metal* case. The court stated:

> "We think it equally clear that, even if there had been an agreement to arbitrate the matter involved in the suit, stay of proceedings could not be had under the provisions of the United States Arbitration Act for the reasons set forth in the opinion in the *Colonial Hardwood* case. We went into the matter fully in the decision in that case and nothing need be added to what we said there, except we note that later decisions in accord are *Shirley-Herman Co. v. International Hod Carriers,* 2 Cir. 182 F. 2d 806 and *Amalgamated Association v. Pennsylvania Greyhound Lines,* 3 Cir. 192 F. 2d 310.

"We are not impressed by the argument that our holding in the *Colonial Hardwood* case must be overruled because of the distinction drawn between contracts of employment and collective bargaining agreements in *J. I. Case Co. v. N. L. R. B.,* 321 U. S. 332. As pointed out by the Court of Appeals of the Third Circuit in the *Pennsylvania Greyhound* case, *supra,* it was necessary in the *J. I. Case* decision to make a distinction which would have no relevance to interpreting the Arbitration Act. It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute. The terms of the collective bargaining agreement become terms of the individual contracts of hiring made subject to its provisions and the controversies as to which arbitration would be appropriate arise in almost all instances, not with respect to the individual contracts of hiring, but with respect to the terms engrafted on them by the collective bargaining agreement. It is with respect to the latter that objection arises to the compulsory submission to arbitration which the Arbitration Act envisages. No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions grafted on them by the collective bargaining agreements."

The first *Pennsylvania Greyhound* case, *supra,* 192 F. 2d at 313, states:

"Our attention has been directed to Justice Jackson's statement in *J. I. Case v. N. L. R. B.* (1944), 321 U. S. 332, 334-35, to the effect that collective

bargaining agreements are not contracts of employment. But this reference is inapposite because the factual context of that case necessitated the drawing of a distinction between collective as opposed to individual contracts of employment. . . . There is no similar compulsion in the context of the Arbitration Act. Contrariwise, the most plausible explanation for the exclusion of contracts of employment from the reach of the Act supports a construction that would give to the words their normally comprehensive significance. Widespread dissatisfaction with compulsion from the federal bench in labor disputes during the era in which the statute was passed[6] was paralleled by the existence of administrative rather than judicial machinery for settlement of labor disputes in the case of both 'classes of workers' specified in Section 1. See 17 Stat. 267 (1872), 46 U. S. C. A. 651 *et seq.* (1944) (seamen); 38 Stat. 103 *et seq.* (1913); 41 Stat. 469 *et seq.* (1920); 44 Stat. 587 (1926), 45 U. S. C. A. Par. 151 *et seq.* (1944) (railroad employees). For Congress to have included in the Arbitration Act judicial intervention in the arbitration of disputes about collective bargaining involving these two classes would have created pointless friction in an already sensitive area as well as wasteful duplication. It is reasonable, therefore, to believe that the avoidance of an undesirable consequence in the field of collective bargaining was a principal purpose of excepting contracts of employment from the Act. In these circumstances the phrase 'contracts of employment' should be construed to include collective bargaining agreements."

"[6]The familiar Norris La Guardia Act, 47 Stat. 70 (1932), 29 U. S. C. Par. 101 (1946), was the national legislative culmination of this dissatisfaction."

In *Ingersoll Products Div., Borg-Warner Corp. v. United Farm Workers, UE,* 34 L. R. R. M. 2174 (N. D., Ill., 1954), the court rejected the argument that the statement of Justice Jackson, cited by Appellant at page 6 of its Opening Brief, is authority for the proposition that the term "contract of employment" in the exclusionary clause does not embrace collective bargaining agreements. The court stated that the discussion of a collective trade agreement by Justice Jackson, 321 U. S. at 355,

> "strengthens the conviction that a collective bargaining agreement is an employment contract within the ambit of the Arbitration Act. . . . It would be a strange and forced refinement, in the context of the Arbitration Act, to exclude collective bargaining agreements from the designation 'contracts of employment.'
>
> ". . .
>
> "Opinion is somewhat divided on this issue, but the weight of reason and authority is on the side of holding that a collective bargaining agreement is within the purview of the exclusion expressed in Section 1 of the Act." (Cases cited.) (34 L. R. R. M. at 2176.)

C. The Exclusionary Clause Was Intended to Apply to Collective Bargaining Agreements and Not to Contracts for Personal Services.

The *Hoover Motor, Lewittes* and *Monumental Life* cases, *supra,* state that the exclusionary clause was intended to avoid the specific performance of contracts for personal services and was not intended to apply to collective labor agreements.

This reasoning is fallacious for obvious reasons. First, the language of the exclusionary clause names groups

of workers, not individual workers. It pertains to contracts of employment of "seamen," "railroad employees" or other "class of workers" engaged in commerce.

Secondly, hiring contracts of individual seamen or railroad employees or employees in any mass industry do not contain arbitration clauses. On the contrary, arbitration is resorted to by parties of roughly comparable economic power. Only organized employees could force an employer to submit disputes to arbitration. Thus, Congress would have been doing an idle act to exclude from the Arbitration Act contracts of individual workers which by their very nature do not contain arbitration clauses. Note, 63 Yale L. J. 729, 731 (1954).

A third reason is discussed in Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes,* 33 Columb. L. Rev. 1366, 1368 (1933):

> "There are two types of labor agreements: the individual contract and the collective, or trade, agreement. Arbitration is rare in individual contracts of employment, though it exists spasmodically in certain of the companies having company unions or 'employee representation.' A general arbitration clause in an individual employment contract would mean arbitration of such questions as the right to discharge,[16] which employers are unwilling to leave to the judgment of outside parties unless forced to do so by a trade union. Intervention of the latter, of course, means the practical end of the individual contract, and the insertion of a trade agreement in its place. At that point, 'industrial arbitration' comes into effect."

"[16]Employers refused to arbitrate the question of discharge until the strong intervention of trade unions. See Estey, THE LABOR PROBLEM (1928) 230 ff. . . ."

D. The Company's Employees Are "a Class of Workers Engaged in Interstate Commerce" Within the Meaning of the Exclusionary Clause.

The circuitous path taken by the Third Circuit in exploring the passages of the Arbitration Act we have already traced.

The *Tenney* case, *supra,* is that court's latest exposition on the Act. Although the court held that the exclusionary clause applied to the entire Act, and that collective bargaining agreements were contracts of employment within the meaning of the exclusionary clause, it sapped the vitality of this holding by declaring that the phrase "workers engaged in foreign or interstate commerce" contained in the exclusionary clause was intended to cover only employees engaged in the transportation of goods in interstate or foreign commerce and did not include employees who work in an establishment manufacturing goods for interstate sale.

The court's decision is based on a technical construction of the phrase "engaged in foreign or interstate commerce" which has no place either in logic or history.

The court cites the interpretation of the United States Supreme Court in *Shanks v. Del. L. & W. Ry.,* 239 U. S. 556, 558 (1916), of that portion of the Federal Employers' Liability Act of 1908 which applied to a railroad employee injured "while he is employed by such carrier . . . in such . . . commerce." The *Shanks* case held that this language included only employees engaged in interstate transportation or in work so closely related to it as to be practically a part of it. The Third Circuit says that since almost exactly the same phrase-

ology is employed in the Arbitration Act of 1925 Congress must have had in mind the *Shanks* construction.

Such a vague notion of Congressional intent should not govern the phrase "engaged in foreign or interstate commerce." It can hardly be said that Congress was using this phrase as a word of art in 1925.

The Appellant states, "It is significant that the Arbitration Act does not use terms such as 'affecting commerce' (Taft-Hartley Act), or 'in the production of goods for commerce' (Fair Labor Standards Act)." (Brief for Appellant, p. 8.) We find no such significance. Not until ten years after the passage of the Arbitration Act, did Congress first attempt to regulate labor relations in industries affecting commerce. N. L. R. A. 1935 (Wagner-Connery Act), 49 Stat. 449, 29 U. S. C. Secs. 151-166. The phrase "affecting commerce" was first construed in *N. L. R. B. v. Jones & McLaughlin Steel Corp.,* 301 U. S. 1, 31 (1937). The phrase "engaged in the production of goods for commerce" was used in the Fair Labor Standards Act of 1938 and was construed in *A. B. Kirschbaum Co. v. Walling,* 316 U. S. 517 (1942), and *Borden Co. v. Borella,* 325 U. S. 679 (1945).

It is pure speculation to hold that Congress had such precise distinctions in mind a decade before either the National Labor Relations Act or the above cited decisions of the United States Supreme Court.

In addition the *Tenney* case in effect negatives the words "any other class of workers engaged in foreign or interstate commerce" in the exclusionary clause by applying the rule of *ejusdem generis* and stating,

> "The draftsman had in mind the two groups of transportation workers as to which special arbitra-

> tion legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers." (207 F. 2d at 452.)

This statement contains an unwarranted assumption that the similar classes of workers mentioned were also covered by such arbitration legislation.

The Fourth Circuit in *United Electrical Workers v. Miller Metal Products, Inc., supra,* 215 F. 2d at 224, stated,

> "Nor are we impressed by the argument that the excepting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation in interstate commerce, as held by the majority in *Tenney Engineering Co. v. United Electrical R. & M. Workers,* 3 Cir. 207 F. 2d 450, 21 L. A. 260. As we pointed out in *Agostini Bros. Building Corp. v. United States,* 4 Cir. 142 F. 2d 854, Congress in enacting the arbitration act was endeavoring to exercise the full extent of its power with relation to the subject matter. There is no reason to think that it was not intended that the exception incorporated in the statute should not reach also to the full extent of its power."

Ingersoll Products Div., Borg-Warner Corp. v. United Farm Workers, UE, supra, (34 L. R. R. M. at 2176), also rejects the distinction made in *Tenney.*

Harris Hub Bed and Spring Co. v. United Electrical Workers, UE, 121 F. Supp. 40 (M. D. Pa. 1954), cited at page 9 of Appellant's opening brief, expressly follows the *Tenney* case, *supra,* and is subject to the same criticism.

E. The Legislative History of the United States Arbitration Act Compels the Conclusion That Collective Bargaining Agreements Are Excluded From the Ambit of the Act.

1. Legislative History Must Be Examined to Ascertain the Intent of Congress.

The ambiguity of the phrase in the exclusionary clause which reads "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" has been demonstrated in the above discussion.

In *United States v. Local 807, Int'l Brotherhood of Teamsters,* 315 U. S. 521 (1942), the Supreme Court construed an exclusionary clause in the Anti-Racketeering Act of 1934 (48 Stat. 979, 18 U. S. C. Sec. 420a). The provision excluded from the Act "the payment of wages by a bona-fide employer to a bona-fide employee."

Just this court has before it three different interpretations of the exclusionary clause of the Arbitration Act, the Supreme Court had before it three varying constructions of the exclusionary clause of the Anti-Racketeering Act: one by the majority of the lower court, a second by the Government and a third from the dissenting judge in the Court of Appeals.

Confronted with these various interpretations, the court said it had to turn for guidance to the legislative history of the statute. It then relied heavily to ascertain the aim and intent of the law upon expressions uttered by the A. F. L. against its application to labor after the bill had passed the Senate and before it was redrafted by the Department of Justice.

Similarly when the Arbitration Act was being considered by Congress:

> "Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.'" 48 A. B. A. Rep. 287 (1923).

The Supreme Court in construing the word "territory" in the Sherman Act noted:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed."
>
> *Puerto Rico v. Shell Co.,* 302 U. S. 253, 258 (1937).

Accord:

> *Vermilya-Brown Co. v. Connell,* 335 U. S. 377, 386 (1948);
>
> *Penn. Mutual Life Ins. Co. v. Lederer,* 252 U. S. 523, 537 (1920). ("The legislative history of an act may, where the meaning of the words used is doubtful, be resorted to as an aid to construction," per Brandeis, J.)

2. Explanations Given on the Floor of Congress Are Entitled to Weight in Ascertaining the Purpose of the Act.

Chief Justice Biggs, concurring in the *Tenney* case, *supra,* in refusing to give weight to legislative history, cites *Duplex Printing Press Co. v. Deering,* 254 U. S. 443 (1921), and *United States v. Kung Chen Fur Co.,* 188 F. 2d 577 (1951).

The *Duplex* case, *supra,* states that explanatory statements in the nature of a supplemental report made by a committee member in charge of a bill in the course of its passage may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. (254 U. S. at 474, 475.) The *Kung Chen* case, *supra,* also recognizes this rule. (188 F. 2d at 584.)

The rule is succinctly stated in *United States v. Great Northern Ry.,* 287 U. S. 144, 154 (1932):

> "In the aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."

In *Wright v. Mountain Trust Bank,* 300 U. S. 440, 463 (1937), Justice Brandeis cited *Duplex* for the above proposition and also stated in footnote 8:

> "Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation . . . to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology."

The rule has been liberalized in modern day. For example, in *United States v. CIO,* 335 U. S. 106, 112 (1948), the court stated:

> "The purpose of Congress is a dominant factor in determining meaning. . . . Nor, where doubt exists, should we disregard informed congressional discussion."

The case of *Levy v. Superior Court,* 15 Cal. 2d 692, 705 (1940), cited at page 11 of Appellant's Opening Brief is not in point. First a proviso expressly excluding collective bargaining agreements was tendered to the California Legislature but not included in the Act. Secondly California had a legislative and judicial history pertaining to the definition of "labor." Thirdly the clause in the *Levy* case is substantially different from the instant case.

3. The Purpose of the Lawmakers Was to Frame a Commercial Rather Than a Labor Arbitration Act.

The Arbitration Act should be "read in the light of the purpose it was intended to subserve and the history of its origin."

> *United States v. Louisville & Nashville R. R.,* 236 U. S. 318, 333 (1915).

The Act was drafted by the Committee on Commerce, Trade and Commercial Law of the American Bar Association and sponsored by the A. B. A. (H. R. Rep. No. 96, 68th Cong., 1st Sess., p. 1.)

The history of the A. B. A.'s connection with the Act is set forth in 50 A. B. A. Rep. 357-362 (1925). All references contained in the A. B. A. history refer to the Act as one dealing with commercial arbitration.

The Arbitration Act in the form set forth in 47 A. B. A. Rep. 315 was introduced in the 67th Congress, 4th Session on December 20, 1922, by Senator Sterling in the Senate and on the same day by Congressman Mills in the House. The bill received the support of the National Association of Credit Men and the New York Chamber of Commerce. It was endorsed by some 46 other organizations, all of which were of a business or commercial nature with the possible exception of the Arbitration Society of America, New York City, and the Building Trades Employees' Association of the City of New York. 48 A. B. A. Rep. 286-287 (1923).

Credit for the passage of the bill through the Senate was given to Charles L. Bernheimer, Chairman of the Committee on Arbitration of the Chamber of Commerce of the State of New York, who also represented a large number of commercial organizations throughout the country. 50 A. B. A. Rep. 357 (1925).

The A. B. A. resolution after the passage of the Act makes "due acknowledgement to the commercial organizations throughout the United States for their splendid cooperation in support of the Act." 50 A. B. A. Rep. 84, 353 (1925).

The chairman of the American Bar Association Committee on Commerce, Trade and Commercial Law testified before the Senate subcommittee which considered the bill:

> "It was not the intention of the bill to make an industrial arbitration in any sense."
>
> Hearing before Subcommittee of Committee on the Judiciary, United States Senate, on S. 4214, 67th Cong., 4th Sess., p. 9 (1923).

The tentative draft did not contain the exclusionary clause. 46 A. B. A. Rep. 359 (1921). As previously pointed out, the Act was later amended to exclude contracts of employment from its operation because of strenuous objection by the president of the Seamen's Union. 48 A. B. A. Rep. 287 (1923).

It may be safely assumed that the Seamen's Union was concerned with arbitration provisions contained in collective bargaining agreements rather than in individual agreements of employment—if any existed at all.

Gordon, in *International Aspects of Trade Arbitration,* 11 A. B. A. J. 717, 718 (1925), observed:

> "No piece of *commercial legislation* comparable with it in importance and value has been passed by Congress for a quarter of a century." (Emphasis added.)
>
> ". . .
>
> "The proviso in it, which excepts from its operation workers' agreements, while regarded by its framers as no improvement, was suggested by Herbert Hoover, Secretary of Commerce, a stanch (*sic*) friend of the measure, as a wise sop to the Cereberus of labor."

The proponents of the bill feared additional labor opposition to that of the Seamen's Union.

> "Labor opposition was based on a feeling that specific performance of arbitration agreements in labor contracts resembled compulsory arbitration, and a fear that it might lead to forced arbitration of disputes of new contract terms."
>
> Comment, 28 N. C. L. Rev. 225, 228 (1950).

Turning to the discussion of the bill in Congress we find that there, too, it was consistently referred to as a commercial arbitration act.

On February 5, 1924, when asked for an explanation of the bill, Representative Graham of Pennsylvania stated:

> "This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in *commercial contracts* and *admiralty contracts*—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to . . . It creates no new legislation, it grants no new rights, except a remedy to enforce an agreement in *commercial contracts* and *admiralty contracts.*" (Emphasis added.) 65 Cong. Rec. 1931.

On December 30, 1924, the bill came before the Senate. Senator Robinson asked to be advised as to the purpose of the bill. Senator Walsh of Montana replied, ". . . The *business* interests of the country find so much delay attending the trial of lawsuits that there is a very general demand for a revision of the law in this regard." 66 Cong. Rec. 984. (Emphasis added.)

The bill as amended by the Senate came before the House on February 4, 1925. Mr. Graham was asked to identify the proponents of the bill. He replied that the proponents of the bill were "commercial." 66 Cong. Rec. 3004.

The above legislative history clearly shows that the purpose of Congress was to enact a commercial rather than an industrial arbitration act.

The bridge between commercial and industrial arbitrations is a wide one.

> Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes,* 33 Columb. L. Rev. 1366 (1933);
>
> 6 Williston, Contracts, Sec. 1930 (rev. ed., 1938).

As pointed out by District Judge Tolin [R. 28], when Congress intends to enact labor legislation, that is, mechanics to enforce industrial arbitration, it will spell out its intent in no uncertain terms, such as it did in Railway Labor Act. (44 Stat. 577, as amended by 48 Stat. 1185 and by 49 Stat. 1189, 45 U. S. C. Chap. 8.)

Lewittes & Sons v. United Furniture Workers, CIO, supra, cited at page 7 of Appellant's Brief, and *United Office Workers CIO v. Monumental Life Ins. Co., supra,* relied on by *Lewittes,* in so far as they construe 1925 legislation by examining current legislation and purported public policy are enactments of judicial legislation. The alleged current attitude of Congress toward the encouragement of labor arbitration as exemplified by the Taft-Hartley law has no bearing on Congressional intent in legislation passed more than 20 years earlier.

> *Cf.* Brandeis, J., in *Penn. Mutual Life Ins. Co. v. Lederer, supra,* at 538.

After the passage of the Arbitration Act commentators recognized that it did not apply to the arbitration of labor disputes but was confined to commercial disputes:

> Baum and Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts,* 8 N. Y. U. L. Q. Rev. 428 (1931);

Fraenkel, *The Legal Enforceability of Agreements to Arbitrate Labor Disputes,* 1 Arb. J. 360, 361 (1937);

Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes,* 33 Col. L. Rev. 1366 (1933);

Simpson, *Specific Enforcement of Arbitration Contracts,* 83 U. Pa. L. Rev. 160, 168 (1934);

Sturges, Commercial Arbitration and Awards, Sec. 32 (1930).

In light of these observations some significance should be attached to the fact that Congress reenacted the Arbitration Act into positive law in 1947 without any change in substance.

More recent comments in the law reviews have recommended that the Arbitration Act be amended so that its scope would encompass written agreements to arbitrate labor disputes.

Comment, 28 N. C. L. Rev. 225, 228 (1950);

Note, 40 Va. L. Rev. 209, 211 (1954);

Note, 102 U. Pa. L. Rev. 558, 563 (1954).

Actually, legislation was proposed by Senator Maloney on March 9, 1942, to bring collective bargaining agreements within the ambit of the Act. S. 2350, 77th Cong., 2d Sess. (1942). He incorporated the bill in a memorandum which sets forth the general purposes of the proposed amendment as follows:

> "The United States Arbitration Act as originally enacted on February 12, 1925 was designed to facilitate the use of arbitration in settling *commercial* disputes." (Emphasis added.) 88 Cong. Rec. 2071.

"Aside from proposed amendments designed merely to clarify the provisions of the Act or to remove legal technicalities that have developed in litigation under the Act since 1925 there are the following substantial proposed amendments:

"1. Extension of the Act to embrace written agreements to arbitrate labor controversies.

"Just as the present Act was designed to overcome the common law rules of 'irrevocability' and 'non-enforceability' of written agreements to arbitrate commercial controversies arising between the parties, so by Section 2A, as proposed, would the Act be extended to written agreements to arbitrate labor controversies." *Id.* at 2072.

The explanation inserted in the Congressional Record was taken from an article by Wesley A. Sturges,* *Proposed Amendment of the United States Arbitration Act,* 6 Arb. J. 227 (1942).

The revised Act proposed by Senator Maloney deletes the exclusionary clause. 88 Cong. Rec. 2073. Added is Section 2A entitled "Agreements to Arbitrate Labor Controversies":

"An agreement in writing between a labor organization, committee, or other representative acting in behalf of two or more employees and any employer, employers, or association or group of employers engaged in a maritime transaction or in commerce to settle by arbitration any controversy or controversies

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*Chairman of the Board of Directors of American Arbitration Association, President of the Association of American Law Schools, Professor of Law and former Dean of the Yale Law School and former Chairman of the Law Committee of the American Arbitration Association.

thereafter arising between them, including any controversies concerning, past, present or future rates of pay, wages, hours of employment, and any other and different past, present, or future terms or conditions of employment of any employee or employees of such employer or employers, or an agreement in writing between two or more labor organizations to settle by arbitration any controversy or controversies thereafter arising between them which shall affect any employer engaged in any maritime transaction or in commerce, or an agreement in writing by such parties to submit to arbitration any such existing controversy, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the avoidance of contracts generally. No agreement for arbitration shall qualify under this section unless the parties shall provide therein what district court of the United States shall have jurisdiction of any and all proceedings under this act with respect to such agreement and any arbitration proceedings and award thereunder. Except as herein otherwise expressly provided, the District court of the United States so designated by the parties shall have exclusive jurisdiction of all such proceedings."

Ibid.

The same amendments to the Arbitration Act were introduced by Representative Kefauver in H. R. 7163 on June 1, 1942. *Id.* at 4785.

No further congressional action was taken by either the House or the Senate in regard to the amendment of the Arbitration Act. It was reenacted in its original form in 1947.

4. The Context of the Exclusionary Clause and the Circumstances Under Which the Words Contained Therein Were Employed Show That the Act Was Not Intended to Apply to Collective Bargaining Agreements.

When we consider that the Arbitration Act was passed in 1925 we must bear in mind that not only was union labor but management as well opposed in principle to the idea of a third party dictating to them what should or should not be done under a collective bargaining agreement. Even though the parties had entered into an agreement including arbitration, either side may well have felt that such provision was forced upon it as a condition to obtaining the rest of the contract. Either the union or the employer or both may well have preferred not to have to be forced into arbitration if the dispute should arise. In 1925 management, of course, jealously guarded its management prerogatives and was undoubtedly extremely antagonistic toward the idea that it could be compelled to permit an arbitrator to take over these prerogatives by force of a court decision.

Likewise it should be remembered in 1925 that the unions would be just as antagonistic toward being compelled to arbitrate a dispute. At that time a no-strike clause was rarely, if ever, agreed to by a union in a collective bargaining contract. If the union were to be compelled to arbitrate under the Arbitration Act, this would in effect remove its right to strike. It is highly unlikely that the unions would have urged then the modern day policy now suggested for the construction of the Arbitration Act.

II.

Even if the United States Arbitration Act Were Applicable, the Union's Motion to Stay Must Be Denied Because the Issue Presented by the Pleadings Herein Is Not Arbitrable.

A. Only Arbitrable Issues May Be Referred to Arbitration Under the Act, and This Court Should Affirm the Order of the Lower Court if the Dispute Between the Parties Is Not Referable to Arbitration.

Even if the Court rules that Section 3 applies to collective bargaining agreements, the suit may be stayed only if "the court in which such suit is pending" is "satisfied that the issues involved in such suit . . . is referable to arbitration under" the agreement between the parties. (United States Arbitration Act, Sec. 3.)

In his opinion below District Judge Tolin having found that the contract involved in this action was specifically excluded from the provisions of the Arbitration Act found it unnecessary to decide arbitrability [R. 27]. His failure to rule on this issue does not, however, bar this Court from affirming on the ground that the issue is not arbitrable. This Court has held that an appellate tribunal may affirm a case on grounds other than those which prompted the judgment below.

Commissioner v. Bryson, 79 F. 2d 397, 402 (1935);

Commissioner v. Stimson Mill Co., 137 F. 2d 286, 287 (1943);

Kishan Singh v. Carr, 88 F. 2d 672, 678 (1937).

As stated by the Sixth Circuit in *Cold Metal Process Co. v. McLouth Steel Cor.,* 126 F. 2d 185, 189 (1942), ". . . the appellee may urge, or the appellate court *sua sponte* may consider any theory, argument or reason

in support of a decision of a lower tribunal regardless of whether or not it applied that theory." (Cases cited.)

Appellee contends that since the issue of damages resulting from a strike in breach of the contract is not arbitrable, this Court should affirm the District Court.

B. Only "Grievances" Are Subject to Arbitration, and the Employer Cannot File a Grievance.

1. A Company "Grievance" Is Not Permitted by the Terms of the Contract.

Article XII of the agreement, entitled "Arbitration," provides that, "any and all *grievances* that cannot be amicably adjusted between the Union Representative and the Employer shall be referred to an impartial board for arbitration." [R. 20.] (Emphasis added.)

> "In general, a word used by the parties in one sense is to be interpreted as employed in the same sense throughout the writing in the absence of countervailing reasons. *'Noscitur a Sociis'* is an old maxim which summarizes the rule both of language and of law that the meaning of words may be indicated or controlled by those with which they are associated." 3 Williston, Contracts, Sec. 618 (rev. ed. 1936.)

For a definition of the term "grievance" we refer to Article VII of the agreement entitled "Disputes, Grievance, Union Representation Thereof." Paragraphs 1 and 2 contain employer proscriptions. Paragraph 2 further provides for the initiation by the employee of the grievance machinery. There is nothing in Article VII which directly or indirectly permits the employer to file a grievance.

The only reference to commencing grievance procedure provides for the employee taking up the matter. Paragraph 2 says:

> "Any *employee* . . . shall make his claim to the union . . . upon receipt of the employee's claim, the union shall inform the employer, and grievance procedure shall be instituted promptly." (Emphasis added.)

Also significant is the fact that Article VII is entitled "Disputes, Grievance, Union Representation Thereof." This would seem to indicate that the Union is the representative which carries forward disputes and grievances. This is buttressed by the fact that Article XII provides for amicable adjustment of grievances between the "union representative" and the employer.

Absurd results flow from requiring the filing of a grievance by management under this contract. Every complaint of the employer would have to be reduced to a grievance (including arbitration) before the employer could act. This could mean that the employer could not without union consent discipline, demote, discharge, layoff or exercise any of the other many necessary acts for efficient management—indeed, any management! The grievance and arbitration procedure could involve weeks and months, and if appealed to court, even years.

What the contract does, in fact, permit is for the employer to take whatever action it feels is appropriate so long as such action is not expressly prohibited by the contract, such as a lockout, when an employee or the union has violated the agreement. If the employer should see fit not to commence a potential war by discharging an employee or employees because of acts of such employees

dictated and directed by the union, but rather to seek the peaceful solution of a determination by the court, it hardly lies in the mouth of the union to say that the employer should have discharged the workers instead of suing the union for damages arising out of the activities of these workers in violation of the contract and as directed by the union.

2. A Company "Grievance" Is an Anomaly in the Field of Labor Relations.

"Grievance" has historically meant a complaint by an employee concerning either working conditions or actions taken by the employer, such as denying him a leave of absence, a wage increase or a promotion or unjustifiably discharging him. Classically it has not referred to complaints by the employer. Complaints by the employer are exercised by action. Thus the employer has always had the right to discharge an employee, to lay him off, to deny him a wage increase, to deny him a leave of absence, or the like. When the employee is dissatisfied with the action of the employer he may then make his claim through what has been known as a "grievance."

Therefore, Article XII means that grievances or complaints *only* by employees may be arbitrated if no satisfactory solution is obtained through the grievance procedure.

Professors Gregory and Katz have stated:

> "An integral part of the modern collective agreement is a grievance procedure—a device for the settlement of claims arising from alleged violations of contract provisions. Primarily this procedure is set up to handle the grievances of particular employees or groups of employees who complain that they have

in some way been deprived of certain rights guaranteed to them under the terms of a contract. It is also geared to process claims which a union may raise on its own behalf, in furtherance of its own separate interests in contradistinction to those of the employees whom it represents. *The prosecution of employer grievances under this procedure, however, is usually not provided for and is ordinarily not thought necessary.*" (Emphasis added.)

GREGORY & KATZ, LABOR CASES, MATERIAL AND COMMENTS 1197 (1948).

It is difficult to find many cases dealing with this problem since it has always been assumed that the employer does not and as a practical matter could not file a grievance. Nevertheless, the authors did find two cases dealing with the problem.

In *Wilson & Company, Inc.,* an arbitration decision by Joseph Lohman, 1 Lab. Arb. 450 (1946), the company alleged a violation of the contract by the union in the latter's arbitrary action in the sharpening of knives. The contract contained a somewhat usual type of grievance procedure in which the arbitrator was unable to find any direct reference to the right of the employer to file a grievance. Accordingly, it was held that the employer had no right to file a grievance.

A highly significant decision was rendered during World War II by the War Labor Board, which was established by Presidential Directive Order pursuant to legislation. Its purpose was to keep industrial peace almost at all costs in view of the no-strike and no-lockout pledge of labor and management. Included in the jurisdiction of this Board was the power to make a contract where the parties were unable to reach an agreement. In *American Chain*

and Cable Co., 26 War Lab. Rep. 761 (1945), the company proposed that the grievance procedure be made available to it for the presentation and settlement of its grievances under the terms of the contract. The company wanted the clause in order to avoid the risk of work stoppages. The company said it had reason to be fearful of work stoppages because the employees were being encouraged by the union to disobey the company directions rather than to file grievances. It concluded that the availability of the grievance procedure to both parties was necessary and fair. The union opposed the inclusion on the ground that management had a positive right to cause the plant to function and to direct the working force. If the union wished to protest the exercise of a particular right, the grievance procedure was available to it only as a negative remedy. Such similar positive right of action was not available to the union, and, therefore, rights similar to the union's ought not to be given to the company. The War Labor Board upheld the union and refused to allow the company to process grievances. It said that the company's grievances would necessarily be somewhat vague, and that its requests would be more like a declaratory judgment.

In *Ingersoll Products Div., Borg-Warner Corp. v. United Farm Workers, UE, supra,* the provision for arbitration in the agreement before the court was one of four steps provided for the settlement of grievances.

The contract defined the word grievance as follows:

> "A grievance is a difference of opinion as to the meaning and application of the provisions of the Agreement, or *as to the compliance of either party hereto* with any of its obligations under this Agreement." (Italics supplied by court.)

The first three steps in the grievance procedure set up a routine of company and union conferences. Step 4 provided that the grievance could be appealed to arbitration "in the event the answer of the Works Manager or his designated representative on a particular grievance is not satisfactory . . ."

The court said, "The imperative condition for invoking arbitration is an unsatisfactory answer from the Works Manager to a complaint by the Union or its member."

The Union contended that the company could refer to arbitration its claim for damages for breach of the no-strike clause, basing its contention on the italicized portion of the definition of a grievance set forth above.

The court rejected this contention, stating that arbitration could be invoked only in the event that the Works Manager gave an unsatisfactory answer to the Union and that this condition was "so definite and inflexible that it cannot be made to yield to an ambiguous overstatement in the definition of a grievance." (34 L. R. R. M. at 2177.)

In *Square D Co. v. United Electrical Workers,* 123 F. Supp. 776 (E. D. Mich., 1954), a motion to stay proceedings pending arbitration was denied. The defendants relied on that portion of the contract which provided for a five-step grievance procedure. Step 1 provided: "The aggrieved employee shall endeavor to adjust his or her grievance with the department foreman . . ." By step 2 the employee's grievance proceeded to the chief steward, by step 3 to the shop committee, by step 4 to the grievance meeting, and under step 5: "If the grievance remains unsettled after the above procedure has been

complied with, the grievance may be referred by the Union or the company to a board of arbitrators."

The district judge stated:

> "It is to be noted that the entire procedure is geared to adjust grievances of employees and that it is completely silent as to any possible grievances by the employer. If the last paragraph, on which defendants so strongly rely, includes within its ambit claims by the employer for breach of contract, how will it proceed? It is not an employee and it would be absurd to suggest that it should initiate a grievance or complaint with the shop foreman, yet, under Sec. 5, it can proceed to arbitration only after 'the above' procedure has been complied with . . .
>
> "The crux of plaintiff's claim in the present suit is the fomenting and inciting of strikes by the Unions and officials and a claim for damages resulting from such alleged acts is obviously not covered by the agreement. The parties to the agreement having failed to provide for this contingency in their agreement, neither party can now urge arbitration as a condition precedent to filing of suit for breach of the contract by reason of any acts such as are complained of in the pleading." (123 F. Supp. at 783.)

In *West Texas Utilities Co. v. NLRB,* 206 F. 2d 442, 446 (D. C., Cir. 1953), (Cert. denied 346 U. S. 855 (1953), the court held that fixing wages or rates of pay for a large percentage of employees in a certified bargaining unit was not an adjustment of a "grievance" within the meaning of Section 9(a) of the Taft-Hartley Act. The court stated:

> "Section 9(a) of the Act makes a duly certified union the exclusive bargaining representative for all employees of an appropriate unit with respect, *inter*

> *alia,* to 'rates of pay, wages, hours of employment, or other conditions of employment' although it permits 'any individual employee or a group of employees * * * to present grievances to their employer and to have such grievances adjusted * * * without the intervention of the (exclusive) bargaining representative.' Although any grievance may be a subject of collective bargaining, not all subjects of collective bargaining are grievances. As we view the word 'grievances' it does not encompass, for example, the setting of wage rates for a large percentage of the employees in a certified bargaining unit. The word 'grievances,' in the field of industrial relations, particularly in unionized companies, usually refers to 'secondary disputes in contrast to disagreements concerning broad issues such as wage rates, hours and working conditions.' "

The Fifth Circuit in *Hughes Tool v. NLRB,* 147 F. 2d 69, 72 (1945), in construing the National Labor Relations Act, said:

> ". . . 'grievances' . . . are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected."

Incidentally, in the National Labor Relations Act, as amended by the Taft-Hartley Act, the only reference to a grievance is that of an employee. Section 2(11) defines a supervisor as one with certain authority in the interest of the employer to carry on certain functions in connection with employees or "to adjust their grievances . . ." Section 9(a) provides that "any individual employee or a group of employees shall have the right to present grievances to their employer . . ."

In *Elgin, J. & E. Ry. v. Burley,* 325 U. S. 711, 723 (1945), the United States Supreme Court distinguished disputes concerning the making of collective agreements and disputes over grievances under the Railway Labor Act of 1934:

> "In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment . . .
>
> "The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment."

As pointed out by Justice Frankfurter in *Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp., supra,* the unions were quick to amend their constitutions in order to avoid the definition of the word "grievance" in the *Elgin* case, *supra.* In footnote 28 of the opinion Justice Frankfurter cites action taken to this

effect by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen. Similarly, the Union in the case at bar could have negotiated for an expanded meaning of the word grievance or a broader arbitration clause in the collective bargaining agreement herein.

The Sixth Circuit in the *Hoover Motor* case, *supra,* relying upon *Elgin* and *West Texas Utilities, supra,* held:

> "In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance." (217 F. 2d at 54.)

C. Damages Resulting From the Union's Conduct in This Case Do Not Create an Arbitrable Issue.

The controlled kill imposed by the Union and followed by the employees is a violation going to the essence of the contract. The contract gives to the company exclusive authority to determine the amount of work to be done by each employee. The direct obligation of the employee to follow the reasonable directions and instructions of the company (including those relating to the rate or amount of production) is contained in Article VII of the collective bargaining agreement [R. 15]. Paragraph 5 directly provides for management to determine "bad workmanship, misconduct, failure to follow instructions, or any breach of discipline . . ."

Paragraph 4 provides that the employee may issue rules for the purpose of maintaining "maximum efficiency."

Article XII expressly prohibits a strike during the term of the agreement [R. 20]. An arbitrary limitation of production determined not by the Company but by the

Union and its members employed by the company, is a slowdown which violates the prohibition against strikes.

> Shulman and Chamberlain, Cases on Labor Relations, 1155 ff. (1949).

See:

> *In re Textile Workers Union and Personal Products Corp.,* 108 N. L. R. B. No. 109, 34 L. R. R. M. 1059, 1063 (1954).

The right to discharge for slowdowns both under the Taft-Hartley law and under union contracts is well established.

> *Elk Lumber Co.,* 91 N. L. R. B. 333, 26 L. R. R. M. 1493 (1950);
>
> *Goodyear Tire and Rubber Co.,* 18 Lab. Arb. 557 (1952);
>
> *National Machine Co.,* 5 Lab. Arb. 97, 99 (1946).

Although the definitions contained in the Taft-Hartley law are not binding upon either the Company or the Union, certainly the definitions contained therein are entitled to great weight as generally accepted definitions. The term "strike" in Section 501(2) of Labor-Management Relations Act, 1947, "includes any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." The editors of Commerce Clearing House, Inc., one of the few publishers of labor relations matters, state:

> "This definition by and large conformed to that used by persons informed in the field of labor relations." C. C. H., Inc., Labor-Management Relations Act, 1947 With Explanation 90 (1947).

Aside from contract language, it is apparent that responsibility for production must rest with management unless there is some unusual clause in the contract qualifying that right. Someone in authority must determine the employee's responsibility. The proper party obviously is the employee's supervisor, that is, the employer.

Thus, it is provided by law that an employee is required to carry out the reasonable directions of the employer.

CALIF. LAB. CODE, Sec. 2856;

Brown v. Ferdon, 5 Cal. 2d 226, 54 P. 2d 712 (1936);

Bell v. Minor, 88 Cal. App. 2d 879, 199 P. 2d 718 (1948);

May v. New York Motion Picture Corp., 45 Cal. App. 396, 402-403, 187 Pac. 785 (1920).

A union's arbitrarily imposed control on production is also a violation of the law requiring that parties to a contract deal in the highest degree of good faith and honesty.

Nelson v. Abraham, 29 Cal. 2d 745, 177 P. 2d 931 (1947);

Matzen v. Horwitz, 102 Cal. App. 2d 884, 228 P. 2d 841 (1951).

Though divided on their construction of the Arbitration Act, the authorities agree that an action for damages against a union for violation of a no-strike clause contained in a collective bargaining agreement is not an arbitrable matter in the absence of language in the contract expressly calling for arbitration of such a dispute.

In fact, even the Company and Union are in apparent agreement on this point. The Union concedes that the

alternative ground of decision in *Colonial Hardwood, supra,* was correct (Brief for Appellant p. 5). This alternative ground turned on the arbitrability of the dispute between the parties. The Court held that the issue of the company's damages for breach of a no-strike provision was not arbitrable.

Article IV of the *Colonial Hardwood* contract was entitled "Grievance Procedure" and consisted of seven sections. Section 1 provided for steward representation. Section 2 provided a step by step procedure for the settlement of disputes presented by employees to the stewards, and for reference, if necessary, to the plant committeeman, the superintendent, the plant committee, the general manager, officers of the local and international unions, with final reference to arbitration. The agreement provided that there would be no strikes or lockouts but that the grievance procedure would be the only method of settling disputes "which are the subject of this agreement." The five remaining sections of this Article related to the machinery of the grievance procedure.

The court held that the arbitration clause

> "has relation to the controversies which are made the subject of grievance procedure . . . and not to claims for damages on account of strikes and secondary boycotts which are matters entirely foreign thereto. Damages arising from strikes and lockouts could not reasonably be held subject to arbitration under a procedure which expressly forbids strikes and lockouts and provides for the settlement of grievances in order that they may be avoided. It would have been possible, of course, for the parties to provide for the arbitration of any dispute which might arise between them; but they did not do this,

and the rule *noscitur a sociis* applies to the arbitration clause in the grievance procedure to limit its application to controversies to which the grievance procedure was intended to apply." (168 F. 2d at 35.)

The same reasoning was applied by the Fourth Circuit in *United Electrical Workers v. Miller Metal Products, Inc., supra.* There the grievance clause provided that

> "all differences, disputes and grievances that may arise between the parties to this contract with respect to the matters covered in this agreement shall be taken up as follows: . . ."

There followed a step by step procedure for the adjustment of grievances ending with submission to arbitration.

A subsequent arbitration section provided:

> "All differences, disputes and grievances concerning matters in this contract which have not been satisfactorily settled . . . shall be submitted to arbitration . . ."

The court said, "What we said in the *Colonial Hardwood* case . . . with respect to the contract there involved is clearly applicable to the contract here . . ." (215 F. 2d at 223.)

In *Markel Electric Products, Inc. v. United Electrical Workers, UE,* 202 F. 2d 435 (2nd Cir., 1953), the collective bargaining agreement contained an article entitled "Grievances" providing in part as follows:

> "Should differences arise between the Company and any employee covered by this agreement as to the meaning and application of the performance of this agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work

on account of such differences, but earnest effort shall be made to settle such differences immediately . . ."

The next three paragraphs set forth a three-step grievance procedure by which a dispute was to be referred first to the department foreman and the aggrieved employee and/or his department stewards, then to the general superintendent and the chief steward, and finally to the executives of the Company and the grievance committee and international representative of the Union.

The Article following was entitled "Arbitration" and provided in part:

> "In the event that the two parties to this agreement fail to make a satisfactory adjustment of any dispute or grievance and such dispute or grievance involves a question as to the meaning and application of the performance of this agreement, such dispute or grievance may be submitted to arbitration . . .
>
> "There shall be no lockouts or strikes . . . All complaints or grievances shall be settled in accordance with the full procedure outlined in this agreement."

The Union caused the employees to strike, and the Company brought an action under Section 301 for damages caused by the strike. The defendant Union's motion for stay of all proceedings pending arbitration was denied. The court stated:

> "The whole tenor of the contract was to lay a groundwork of agreement as to wages, hours and conditions of employment and to provide a peaceful method for the settlement of grievances and disputes over the meaning and application of the agreement with respect to those matters."

". . . .

"The dispute as to whether the union was justified in calling the strike is one certainly not capable of resolution at a conference between an employee or a department steward, or both, and a department foreman; or between the chief steward and the general superintendent. It is, therefore, not the kind of dispute which was intended to be resolved by submission to arbitration." (202 F. 2d at 437.)

Appellant cites four cases to show that the Arbitration Act excludes collective bargaining agreements. Two of the cases, *Hoover Motor* and *Harris Hub, supra,,* finally held that the issues before them were not arbitrable issues. The third case, *Tenney, supra,* was remanded for a determination of the issue of arbitrability since the issue could not be determined from the record before that court.

Only the *Lewittes* case, *supra,* held both that collective bargaining agreements were not excluded by the Arbitration Act and that the issue before the court was an arbitrable one.

Hoover Motor Express Co. v. Teamsters Union, AFL, supra, involved an action for damages arising out of the breach of a no-strike clause by the Union. The agreement contained an article entitled "Grievance Machinery and Union Liability," which read in part as follows:

"The Unions and the Employers agree that there shall be no strikes, lockout, tieup, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall apply . . ."

The final step of the procedure provided:

> "Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Committee determine to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse."

The Sixth Circuit in refusing to grant the Union's motion for stay of proceedings and to refer the action for damages to arbitration, stated:

> "Assuming but not deciding that Section 1, which contains no provision for arbitration but does provide in Subsection (d) for submission of deadlocked cases to 'umpire handling,' could be construed as providing for informal arbitration, we think that under this record Section 1 plainly covers only the settlement of grievances. In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance.
>
> ". . . .
>
> "We think that . . . the calling of the strike did not constitute a grievance; that it therefore was not subject to the settlement procedure of Article VIII. Section 1 of the contract contemplates that complaints of employees which might eventually culminate in a strike namely, grievances, were to be settled in a certain manner under Section 1, but the violation of the no-strike agreement of the collective bargaining contract is not a grievance. The record presents no provision that such a situation shall be arbitrated." (217 F. 2d at 53, 54.)

In *Harris Hub Bed & Spring Co. v. United Electrical Workers, UE, supra,* the Pennsylvania district court had

before it a collective bargaining agreement substantially similar to that in the *Markel Electric* case, *supra.* The grievance clause was broad providing that "any claim, difference, dispute or grievance shall be taken up as follows: . . ." There followed a four-step grievance procedure as in the *Markel Electric* case. The final step provided:

> "If no satisfactory settlement is reached, then the difference, dispute or grievance shall at the request of either party be submitted to arbitration as hereinafter provided."

The district judge denied the union's motion for stay pursuant to Section 3 of the Arbitration Act stating:

> "It is clear that the arbitration clause embedded in Article XI has relation to the controversies which are made the subjects of the grievance procedure of that article, and not to claims for damages on account of strikes and lockouts, which are matters entirely foreign thereto. Damages arising from strikes and lockouts could not be held subject to arbitration under a procedure which expressly prohibits strikes and lockouts and provides for the settlement of grievances in order that such may be avoided." (121 F. Supp. at 43.)

The *Lewittes* case relied on by the Union (Brief of Appellant p. 7) concerned a contract containing language much broader than in the instant case:

> "All grievances, complaints, differences or disputes arising out of or relating to this agreement, *or the breach thereof,* shall be settled in the following manner: . . ." (Emphasis added.)

The court specifically pointed out that:

> "The broad language adopted by the parties is unrestricted and . . . the question of damages arising by reason of the defendant's alleged breach of its non-strike pledge is within its ambit . . .
>
> ". . . it includes controversies arising within a breach of the agreement." (95 F. Supp. at 853.)

District Judge McGranery who decided the *Monumental Life* case, *supra*, relied on by *Lewittes,* denied a motion to stay under Section 3 of Arbitration Act in *Metal Polishers Union, AFL, v. Rubin,* 85 F. Supp. 363, 364 (E. D. Pa. 1949).

This was an action brought by the plaintiff union under Taft-Hartley, Section 301, charging that the defendant violated the collective bargaining agreement by locking out members of the plaintiff union.

Judge McGranery stated:

> "But in determining, on a motion for a stay, whether there is anything to arbitrate in the contract sued on, the court must take the moving party's version of the issue: *Shanferoke Coal & Supply Corp. of Del. v. Westchester Service Corp.,* 70 F. 2d 297, affd. 293 U. S. 449. And here the moving party merely maintains that there is an arbitrable issue because of the existence in the contract of a broad-scope arbitration clause to the effect that 'any matter in dispute' between the parties shall be referred to arbitration.
>
> "However, section 2 describes only three types of agreements covered by the Arbitration Act. One, an *ad hoc* agreement to arbitrate an existing dispute, is inapplicable here. The other two are agreements to arbitrate an issue arising out of the contract and to

arbitrate an issue arising out of a refusal to perform the contract. Hence, despite the extremely broad scope of the arbitration clause contained in the contract between the parties herein, the act itself contemplates narrower situations. To justify a stay under the act, there must appear an arbitrable issue arising out of the contract or out of a refusal to perform it and not merely 'any matter in dispute' between the parties. The defendant's assumption, therefore, that the existence of any dispute sufficiently grounds a stay, is erroneous.

". . . .

"The item of damages for breach of a contract is normally arbitrable: (Cases cited.) However, under a labor agreement which expressly forbids strikes and lockouts *pending* the arbitration of disputes, it is not reasonable to suppose that damages *resulting* from a strike or a lockout were contemplated as the subject of arbitration: *International Union, United Furniture Workers of America v. Colonial Flooring Co., Inc.,* 168 F. 2d 33.

"Thus, 'any dispute' between the parties is subject to restrictive interpretation at its broadest. Since it does not cover every conceivable dispute between the parties, more is required than the bare assertion of the existence of an arbitrable issue."

The foregoing authorities show that the dispute between the parties cannot be referred to arbitration under their contract. Only by reading absent language into the contract can the Union urge that this matter is referable to arbitration.

Conclusion.

The Company's action for the Union's breach of the collective bargaining contract cannot be stayed pending arbitration under Section 3 of the United States Arbitration Act since the Act does not apply to this contract.

Even assuming that the Act is applicable, the Company's action does not present an issue referable to arbitration under Section 3 of the Act.

Therefore, this Court should affirm the Order of the court below denying Appellant's Motion to Stay.

Respectfully submitted,

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RICHARD J. KAMINS,
Attorneys for Appellee.

Nos. 14503 - 14504

United States
Court of Appeals
for the Ninth Circuit

JOW CHU YUN, on Behalf of JOW MUN YOW,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

JOW CHU YUN, on Behalf of JOW KWONG YEONG,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

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Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 33427

In the Matter of

The Application of JOW CHU YUN, on Behalf of JOW MUN YOW,

Petitioner,

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable United States District Court for the Northern District of California, Southern Division:

The petition of Jow Chu Yun respectfully shows and represents:

I.

That at all times herein mentioned your petitioner, Jow Chu Yun, was and is a citizen of the United States and resides at 885 Page Mill Road, in the City of Palo Alto, County of Santa Clara, State of California, within the above District.

II.

That at all times herein mentioned Jow Mun Yow was and is a son of your petitioner and that at the time of his admission to the United States he was of the age of nineteen (19) years and ten (10) months.

III.

That at all times herein mentioned Bruce G. Barber was and is the District Director of the Immigra-

tion and Naturalization Service of the Department of Justice with offices in the City and County of San Francisco, State of California, within the above District.

IV.

That your petitioner's son Jow Mun Yow, is now in the custody of said Bruce G. Barber, as District Director of the Immigration and Naturalization Service, and is deprived illegally of his liberty by said Bruce G. Barber and that the alleged cause of his detention is as follows, to wit.

That said Jow Mun Yow was admitted into the United States on or about October 21st, 1951, at San Francisco, California, and that he carried with him for presentation to the Immigration and Naturalization Service a Consular Travel Affidavit, accompanied by a travel authorization stamp duly signed and sealed by Vice Consul James T. Rousseau at Hong Kong, British Crown Colony; that said Jow Mun Yow is a citizen of the United States, being the son of your petitioner herein; that following his admission to the United States, he was permitted to enter the United States under bond and has been assisting your petitioner in growing flowers at Palo Alto, California; that proceedings were had before a Board of Special Inquiry of the Immigration and Naturalization Service to determine that said Jow Mun Yow was a son of your petitioner and as such was a citizen of the United States. That said Board of Special Inquiry held that the identification of said Jow Mun Yow, as the son of your petitioner,

had not been satisfactorily established; that several appeals were taken from said Board of Special Inquiry to the Board of Immigration Appeals and that the findings of the Board of Special Inquiry held in San Francisco, on December 7, 1951, were affirmed.

That the Immigration and Naturalization Service, acting through the aforesaid Bruce G. Barber, as District Director, has ordered said Jow Mun Yow excluded from the United States and that said Jow Mun Yow is presently in the custody of the said Bruce G. Barber for the purpose of being excluded from the United States by air line, for transportation back to Hong Kong, China.

That all administrative proceedings have been exhausted and that the only remedy available to petitioner is by application to this Court for a Writ of Habeas Corpus.

V.

That said proceedings had before said Board of Special Inquiry of the Immigration and Naturalization Service were sham and were not in fact a real hearing as to petitioner's relationship to the aforesaid Jow Mun Yow; that evidence was excluded from said hearing dealing with blood and paternity tests which would have established that petitioner is the father of said Jow Mun Yow and that said Board of Special Inquiry acted contrary to uncontradicted evidence which clearly established that the relationship of father and son existed between your petitioner and said Jow Mun Yow.

VI.

That there has never been any judicial inquiry or court proceeding into the matter of petitioner's relationship to said Jow Mun Yow and that the Imimigration and Naturalization Service admits that your petitioner is a citizen of the United States. That if said Jow Mun Yow is deported from the United States, pursuant to the aforesaid order of the Immigration and Naturalization Service, he will be sent to Hong Kong from whence he will be sent into Communist China and will suffer and is likely to suffer great mental and physical torture and that your petitioner, as his parent, will be denied having the companionship of his own son, who is a citizen of the United States.

Wherefore, petitioner prays that a Writ of Habeas Corpus issue directing the aforesaid Bruce G. Barber to produce the body of Jow Mun Yow before the above-entitled Court on a day certain, to there inquire into the legality and lawfullness of the restraint of said Jow Mun Yow.

/s/ JOW CHU YUN,
Petitioner.

/s/ BERTRAM H. ROSS,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed March 23, 1954.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, hereinafter referred to as respondent, by and through his attorneys, Lloyd H. Burke and Charles Elmer Collett, to show cause why a writ of habeas corpus should not be issued, and admits, denies, and alleges as follows:

I.

Admits the allegations contained in paragraph I of the petition.

II.

Denies the allegations contained in paragraph II of the petition, and affirmatively asserts that Jow Mun Yow has never been admitted to the United States.

III.

Admits the allegations contained in paragraph III of the petition.

IV.

In answer to the allegations contained in paragraph IV of the petition, respondent admits, denies, and alleges as follows:

(a) Admits that Jow Mun Yow is now in the custody of the respondent, but denies that Jow Mun Yow is being illegally deprived of his liberty and affirmatively asserts that said Jow Mun Yow is lawfully detained for deportation following exclusion from the United States.

(b) Denies that Jow Mun Yow was admitted to the United States at any time, and affirmatively asserts that at the time of Jow Mun Yow's arrival at San Francisco, California, on October 21, 1951, he was held for examination before a Board of Special Inquiry.

(c) Admits that at the time of arrival Jow Mun Yow had in his possession a Travel Affidavit executed before a Vice Consul of the United States at Hong Kong, said affidavit being issued for travel to the United States for the purpose of having Jow Mun Yow's claim of citizenship tested by the Immigration and Naturalization Service.

(d) Denies that Jow Mun Yow is or ever was a citizen of the United States, and denies that he is the son of the peitioner, Jow Chu Yun.

(e) Admits that on July 22, 1952, Jow Mun Yow was paroled into the United States on bond pending termination of exclusion proceedings.

(f) Admits that proceedings were had before a Board of Special Inquiry to determine whether said Jow Mun Yow was entitled to enter the United States, and asserts that Jow Mun Yow was lawfully excluded from the United States on the ground that he was an alien not in possession of an unexpired immigration visa and that he did not present a passport or other document issued by the government of which he was a national showing his origin and identity.

(g) Admits that the excluding decision of the Board of Special Inquiry was affirmed by the Board of Immigration Appeals on August 14, 1953.

(h) Admits that Jow Mun Yow is in the custody of the respondent for the purpose of deportation from the United States pursuant to the exclusion order of the Board of Special Inquiry.

(i) Admits that all administrative remedies have been exhausted.

(j) Denies all other allegations contained in paragraph IV.

V.

Denies the allegations contained in paragraph V of the petition.

VI.

Admits that there has been no judicial proceeding into the matter of the alleged relationship of Jow Mun Yow to the petitioner; admits that the petitioner, Jow Chu Yun, is a citizen of the United States; admits that Jow Mun Yow will be deported to China via Hong Kong; denies all other allegations contained in paragraph VI.

Wherefore, the respondent prays that the petition for a writ of habeas corpus be dismissed and the order to show cause be discharged.

Dated at San Francisco, California, this 31st day of March, 1954.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Respondent.

[Endorsed]: Filed March 31, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33427

In the Matter of

The Application of JOW CHU YUN, on Behalf of JOW MUN YOW,

Petitioner.

ORDER GRANTING HABEAS CORPUS

This petition is brought on behalf of a 19 year old boy who is seeking entrance into this country as the foreign born son of a United States citizen. This boy was detained at the port of San Francisco for a hearing by a board of special inquiry upon his right to enter the United States. Said board denied his claim and excluded him from admission on the basis that Jow Mun Yow had not satisfactorily identified himself as the son of the petitioner. Pending appeal he was paroled into the United States under bond. All administrative proceedings having been exhausted, application is made to this court for a writ of habeas corpus for the reasons that evidence was excluded at the hearing dealing with blood and paternity tests, and that the board acted contrary to uncontradicted evidence which it is claimed clearly establishes that the relationship of father and son exists between petitioner and Jow Mun Yow.

It is agreed to by the parties that habeas corpus is the proper remedy in this matter.

While it is settled that a release under bond is not deemed to be an entry into this country, Kaplan vs. Tod, 267 U. S. 228; and Shaughnessy vs. Mezei, 345 U. S. 206; still, where the person sought to be excluded has been admitted into the United States by the Immigration and Naturalization Service, regardless of the method of entry under which he was allowed, the matter must be treated as a deportation matter giving the right to a hearing on a writ of habeas corpus in the United States District Court. Shaughnessy vs. Mezei, supra; Conn vs. Gottlieb, 265 U.S. 310; Heikkila vs. Barber, 345 U. S. 229; Rubenstein vs. Brownell, 206 F. (2d) 449; Quon Poy vs. Johnson, 273 U.S. 352; Hughes vs. Tropello, 296 F. 307; U. S. ex. rel. Vajka vs. Watkins, 179 F. (2d) 137.

It Is Ordered that the petition for writ of habeas corpus herein filed be and the same is hereby granted.

Dated: June 8th, 1954.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed June 8, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33427

In the Matter of

The Application of JOW CHU YUN, on Behalf of JOW MUN YOW,

Petitioner.

ORDER

The above matter having come on for hearing on the 30th day of June, 1954, and it appearing that in response to the Order of this Court entered on June 8, 1954, the respondent produced before this court the said Jow Mun Yow and placed into evidence his exhibits dealing with blood and paternity, and the court having reviewed all of the records and files of the administrative hearing, and after a full consideration of all the evidence, both oral and documentary, and the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered that the Writ of Habeas Corpus heretofore issued be vacated and the petition herein be dismissed.

Dated: July 16, 1954.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. Dist. Court.

[Endorsed]: Filed July 16, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33428

In the Matter of

The Application of JOW CHU YUN, on Behalf of JOW KWONG YEONG,

Petitioner,

ORDER

The above matter having come on for hearing on the 30th day of June, 1954, and it appearing that in response to the Order of this Court entered on June 8, 1954, the respondent produced before this court the said Jow Kwong Yeong and placed into evidence his exhibits dealing with blood and paternity, and the court having reviewed all of the records and files of the administrative hearing, and after a full consideration of all the evidence, both oral and documentary, and the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered that the Writ of Habeas Corpus heretofore issued be vacated and the petition herein be dismissed.

Dated: July 16, 1954.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. Dist. Court.

[Endorsed]: Filed July 16, 1954.

[Title of District Court and Cause.]

No. 33427

NOTICE OF APPEAL

Notice is hereby given that the petitioner above named does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order vacating writ of habeas corpus and denying the petition therefor, entered on July 16, 1954.

Dated this 26th day of July, 1954.

/s/ BERTRAM H. ROSS,
Attorney for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 27, 1954.

[Title of District Court and Cause.]

No. 33428

NOTICE OF APPEAL

Notice is hereby given that the petitioner above named does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order vacating writ of habeas corpus and denying the petition therefor, entered on July 16, 1954.

Dated this 26th day of July, 1954.

/s/ BERTRAM H. ROSS,
Attorney for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 27, 1954.

[Title of District Court and Cause.]

Nos. 33438 and 33427

STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated by and between appellants and appellee that appellant's appeals in the above-entitled causes to the United States Circuit Court of Appeals for the Ninth Circuit may be presented upon a single record and that after said matters are docketed in the United States Circuit Court of Appeals for the Ninth Circuit that the two appeals may be consolidated and argued and briefed together as a single appeal.

Dated this 24th day of August, 1954.

/s/ BERTRAM H. ROSS,
Attorney for Appellants.

/s/ LLOYD H. BURKE,
United States Attorney,
Attorney for Appellee.

[Endorsed]: Filed August 31, 1954.

[Title of District Court and Cause.]

Nos. 33427 and 33428

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For Petitioner:

BERTRAM H. ROSS, ESQ.

For Respondent:

LLOYD H. BURKE, ESQ.,
United States Attorney, By

MILTON T. SIMMONS, ESQ.,
Assistant U. S. Attorney.

Wednesday, June 30, 1954

The Clerk: Jow Yeong and Jow Yow.

Mr. Ross: We are ready. May the record show that the petitioner is here, and by a Writ of Habeas Corpus, that the two young men are present in Court.

At this time the Petitioners would like to offer in evidence by reference the file of the Immigration and Naturalization Service involving the record of the two applicants.

The Court: I am somewhat confused in relation to this proceeding. I issued a Writ of Habeas Corpus on the theory that you didn't have an opportunity to present your evidence at the Hearing Board; am I correct?

Mr. Ross: That plus the fact that the action by the Hearing Board was arbitrary and capricious, and that the decision of the Appeal Board and the Special Board of Immigration Appeals, was contrary to the uncontradicted evidence.

The Court: What is your thought?

Mr. Simmons: My understanding, your Honor, was that the Writ was granted because it was your understanding that the Government had refused to permit the blood tests and——

The Court: You are correct.

Mr. Simmons: And I believe that Counsel has the blood tests, and we are willing to stipulate that they can go into the record for your [2*] Honor's——

The Court: Is that agreeable with you?

Mr. Ross: Yes, your Honor, except that I would like for the sake of the record, and in view of my views of the various decisions under the McCarran Act and your Honor will see when I sum up my reasons for that, I would like to offer by reference this Immigration File, as it should properly be.

The Court: Any objection?

Mr. Simmons: There is no objection. We believe that the Court should review the proceedings.

Mr. Ross: That is offered by reference to Petitioner's Exhibit No. 1.

We now at this time offer into evidence by stipulation a report by Dr. Gerson Biskind, (spelling) B-i-s-k-i-n-d, M.D. of 2107 Van Ness Avenue, who conducted a paternity test and rendered a report

under date of March 30th, 1954, and it is stipulated that if the Doctor were here, he would testify in accordance with the written report.

Mr. Simmons: We so stipulate.

The Court: It may be marked.

Mr. Ross: May that be marked next?

The Clerk: Exhibits 1 and 2 in evidence.

(Thereupon the documents referred to and identified above were received in evidence and marked Petitioner's Exhibits Nos. 1 and 2.)

PETITIONER'S EXHIBIT No. 2

Gerson R. Biskind, M.D.
2107 Van Ness Avenue
San Francisco 9
GRaystone 4-8269

March 30, 1954.

Bertram H. Ross, Attorney,
1012 Citizens National Bank Bldg.,
453 South Spring Street,
Los Angeles 13, California.

Dear Mr. Ross:

We have performed the following blood typing studies on Jow Chu Yun, Jow Kwong Yeong, and Jow Mun Yow, and the results are listed below:

Jow Chu Yun

Blood Group.....IV-O

M-N Type.....M Positive

.....N Positive

Rh Type—

C.....Positive
c.....Negative
D.....Positive
E.....Negative
e.....Positive

Probable Genotype.....CDe/C-e

Jow Kwong Yeong

Blood Group.....II-A

M-N Type.....M Positive
.....N Negative

Rh Type—

C.....Positive
c.....Positive
D.....Positive
E.....Positive
e.....Negative

Probable Genotype.....CDE/c-E

Jow Mun Yow

Blood Group.....IV-O

M-N Type.....M Positive
.....N Positive

Rh Type—

C.....Positive
c.....Negative
D.....Positive
E.....Negative
e.....Positive

Probable Genotype.....CDe/C-e

These findings indicate that Mr. Jow Chu Yun is homozygous for the small "e" factor, and does not have the large "E" factor. The absence of small "e" in Kwong Yeong and the presence of the big "E" indicates that he is homozygous for the big "E" factor. In order to be the son of Jow Chu Yun he should have inherited one small "e" factor. Since not even one small "e" factor could be demonstrated, it is evidence that he is not the son of Jow Chu Yun.

In the case of Jow Mun Yow it is not possible to exclude him as the son since he is exactly the same blood group and type as Mr. Jow Chu Yun.

Yours very truly,

/s/ GERSON R. BISKIND, M.D.

GRB:mb

Received April 1, 1954.

Admitted in evidence June 30, 1954.

Mr. Ross: Now, there are only two other things I would [3] like to do for the Court and to complete this record. I would like to ask the father and the Petitioners in this proceeding to step forward so that the Court can see what they look like; merely for purposes of identification, no testimony at all.

Will you step forward, Mr. Jow, please?

(Request complied with.)

Mr. Ross: Just stand up here so that the Court

can look at you and then you can take your seat. Will you turn around slowly?

(Request complied with.)

Mr. Ross: May he be seated now, your Honor?

The Court: Yes.

Mr. Ross: You, first. Which are you, Jow Mun Yow? You are Jow Mun Yow. Will you turn around slowly so that the Court can look at you?

(Request complied with.)

Mr. Ross: You may be seated.

Jow Kwong Yeong. Okay.

The Court: Who is that?

Mr. Ross: This is the younger boy, the one that the blood tests excluded under the blood test, your Honor.

The Court: What is the similarity of this last?

The Court: I don't see any physical similarity at all, your Honor, and the blood test indicates that the younger boy is excluded under that blood test from being the son of the [4] first gentleman you saw.

Under the blood test, the first young man could be, under the blood test, the son. And that is why I wanted your Honor to see both the alleged father and the alleged son that there is a remarkable physical similarity.

The Court: What is your thought on it?

Mr. Simmons: Well, if the Court please, as Counsel has indicated, the second boy, by the blood test, could not be the son of the alleged father. As to the other boy, the blood test is not conclusive. It

merely indicates that he is of the same group as the alleged father and could be the son; likewise, comparison of physical features, just in a general mass or group is nothing.

Of course, it is possible that they might be and it is possible that they might be two persons unrelated having identical features, so we have contended it proves nothing.

Mr. Ross: I just have a couple of moments of argument, that I would like to present to your Honor.

The Court: Proceed.

Mr. Ross: In this matter, if it please the Court, your Honor recalls that prior to the adoption and effective date of the McCarran Act in these Chinese cases, we were entitled to come in for declaratory relief under Section 703 of the Immigration Naturalization Act of 1940 and have a trial before the U. S. District Judge on the subject. [5]

The McCarran Act effective in December of 1952, I believe, rendered that impossible and now we are relegated to a hearing on habeas corpus. I am not going to ask your Honor to determine whether or not the habeas corpus takes the position in place of Section 703 because I don't think it's a matter that a U. S. District Judge can determine. I think ultimately that is a matter that is going to have to be determined by the Supreme Court of the United States, but I am going to reduce this case to some very, very simple terms, I think it's extremely simple.

We have a record here before your Honor, which

under the McCarran Act, your Honor is entitled to review on habeas corpus. If your Honor finds that the action based upon this record of the Immigration and Naturalization Service is arbitrary and capricious, your Honor has the right to turn the petitioners loose, and to determine that, they have established their paternity. The whole proceedings before the Immigration Naturalization Service was to determine whether or not these two young men were the sons of the petitioner.

Now, the record shows without contradiction that the petitioner is an American citizen, that is admitted, there is no question about it. There is no question that he went back to China and he got married in China. He claims to have had two children in China. The record fits together perfectly as to his sending money, to his sending money to his wife and [6] children in China, to his constantly making applications to get these two sons. The dates that he was in China fit with the ages of these two boys. The pictures, Exhibits A & B in the file, indicate that he did have a son when he was in China. His brother has testified as to his visits to his wife before she died and these two boys in China. The record is entirely clear from the testimony of these two boys, that they wrote to their mother—wrote their mother and grandmother. Everything fits into the record, but one little point, and we feel on that one little point the Immigration and Naturalization Service has been arbitrary and capricious.

If there is substantial evidence before your Honor,

your Honor cannot disregard that because of some hunch your Honor has. Sure, if it's an inference versus evidence, it's different.

Now, the one little thing upon which this record resulted in an exclusion order is the fact that these boys testified that they didn't remember making a certain trip to Hong Kong from Macao in 1946, at the time when they were ten or eleven years of age. The uncles having testified that they met them in China and one of them took them on a trip into Hong Kong. The boys did know that they had seen the uncle and visited—money was brought from the father—but they said they didn't remember the trip.

Now, it is entirely possible that both the uncle and the boys could have been telling the truth. They went through some [7] rather rugged things prior to 1946 in China, and it's possible that ten year old boys, who were subjected to this China-Japanese War and other things might not remember something. But, if your Honor reads this record over, your Honor will come to the conclusion and the opinion, which is inescapable, that there has been an identification.

Now, as to the blood tests. Your Honor knows, I know, that the law gives no more credence to this testimony than to anything else. In my forthrightness with this Court when I found the result of the blood tests as to both boys, I brought it in before your Honor for whatever it is worth. I didn't control it, I didn't try to hold one test out and bring the other in; they are both here before your Honor.

I submit that in line with decisions that your

Honor has reached, which are now on appeal in the Circuit Court of Appeals, that this is a perfect case, at least as to the one boy and possibly to the two of them. I think that your Honor is obliged to read this record and if your Honor comes to the conclusion that I have come to, that the Immigration Service was arbitrary and capricious in denying the rights of American citizenship and the rights to stay in this country to these boys, that your Honor should order the discharge of these two boys and permit them to remain in the United States.

Mr. Simmons: If the Court please, I agree with Counsel in this respect, that the main problem before the Court will be [8] a review of the proceedings before this Service.

However, I believe that you will find on a review of the record, that there was more than one point of discrepancy and that the Board of—I mean the Board of Immigration Appeals in deciding the matter on appeal, pointed out that the members of the Board of Special Inquiry were in a position to observe the conduct and demeanor of all of these witnesses at the time that they gave testimony. They found discrepancies and conflicts in the testimony of the witnesses and the lack of acceptable evidence.

Now, it's important to remember that in these cases of this nature, we have a difficult problem of identification. And the Board of Special Inquiry and the Board of Immigration feels, when confronted with, a problem of determining whether or not the claimed relationship exists. We have, of course, as your Honor is familiar, the usual testi-

mony, and they go into what may appear to be collateral matters in an effort to determine whether there is in fact credence to be placed on the testimony of the witnesses. It's the only way in which they can attempt to do justice to the matter. And, therefore, they have a double consideration: Was there any evidence, was there sufficient evidence given, and was the testimony reliable on the basis of discrepancies or lack of discrepancies, and as one Court has pointed out, sometimes a perfect story means that it was prearranged, if there are no discrepancies. [9]

Now, in this case, they have indicated in the decision that there was both a lack of evidence and discrepancies and, I believe, that your Honor will find on a review that the Board's statements in that regard were correct.

The Court: Is there any other information you can give, Counsel?

Mr. Ross: All I can say to your Honor is that the Special Board of Inquiry, which is held at a point of embarkation, such as San Francisco, is made up of Immigration Inspectors who are employees of the Government and employees of the Immigration Service, and at that hearing, which was a very lengthy one, these petitioners were represented by one Jack Chow, who is a local attorney here. And then when the announcement was made, there was an appeal with a brief filed by the Board of Immigration Appeals, which likewise is composed of members of the Department of Justice, employees

of the Immigration Service, who constituted the particular board doing that type of work,—I mean——

Mr. Simmons: May I make one correction, Counsel? They are not employees of the Immigration Service, they are directly under the Attorney General and not connected in any way with our service here.

Mr. Ross: That is true, but your Service is a part of the Department of Justice. The Board is a part of the Department of Justice. To me, it is like a situation of having a [10] Police Board of Rights determining appeals which is made up of policemen. I mean that is the thought that I have, that judicial review is an independent—which you don't have—administrative tribunal reviewing a work of a department within a department.

The Court: Now, in the record where is the transcript of the hearings?

Mr. Simmons: A full transcript of the testimony is there, your Honor.

The Court: All right. Let the matter stand submitted.

Mr. Ross: May I say this to your Honor? Counsel advises me that in view of the length of time that this matter has taken, I can make an application to the Director of Immigration for bail, pending your Honor's decision, and if we are unhappy with the determination there, we can come to your Honor and ask your Honor to fix bail?

The Court: Pursue your remedy of law, whatever it may be.

Mr. Ross: Thank you, your Honor.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 11 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ JOAN Y. VAN ZANTE.

[Endorsed]: Filed September 2, 1954. [11]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for writ of habeas corpus.
Order to show cause.
Return to order to show cause.
Order granting habeas corpus.
Order.
Notice of appeal.
Designation of record on appeal.
Stipulation re record on appeal.

Petitioner's exhibits 1 and 2.

Reporter's transcript of proceedings on trial, June 30, 1954.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 3rd day of September, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14,503. United States Court of Appeals for the Ninth Circuit. Jow Chu Yun, on behalf of Jow Mun Yow, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 3, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 14,504. United States Court of Appeals for the Ninth Circuit. Jow Chu Yun, on behalf of Jow Kwong Yeong, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 3, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 14,503

JOW CHU YUN, on Behalf of JOW MUN YOW,

Appellant,

vs.

BRUCE G. BARBER, as District Director of Immigration and Naturalization Service,

Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD PURSUANT TO RULE 17(6)

Appellant in the above-entitled cause will rely upon the following points:

(a) That the Immigration Service determined that Jow Mun Yow was not a citizen of the United States contrary to the evidence;

(b) That the United States District Court erred in determining that Jow Mun Yow was not a citizen of the United States;

(c) That the action of the Immigration and Naturalization Service in determining that Jow Mun Yow was not a citizen of the United States was arbitrary and capricious;

(d) That the McCarran Act merely substituted habeas corpus in place of Section 703 of the previous

Immigration and Nationality Act, which entitled American citizens of Chinese origin to determine their citizenship by declaratory relief.

Appellant designates the following portions of the record as being necessary to deal with the foregoing problems:

(a) Petition for writ of habeas corpus;

(b) Return to order to show cause by Bruce G. Barber;

(c) Order granting writ of habeas corpus entered June 8, 1954;

(d) Order vacating writ of habeas corpus and dismissing petition;

(e) Transcript of oral proceedings before the United States District Court on June 30, 1954;

(f) Notice of appeal filed herein;

(g) Stipulation re record on appeal;

(h) File of Immigration Service, including transcript of testimony before Board of Special Inquiry, which was introduced in evidence by reference.

Dated this 9th day of September, 1954.

/s/ BERTRAM H. ROSS,
As Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 10, 1954.

Nos. 14503-14504

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOW CHU YUN, on behalf of JOW MUN YOW,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

JOW CHU YUN, on behalf of JOW KWONG YEONG,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

Appeals From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

BERTRAM H. ROSS,
453 South Spring Street,
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Nos. 14503-14504

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Jow Chu Yun, on behalf of Jow Mun Yow,

Appellant,

vs.

Bruce G. Barber, District Director, Immigration and Naturalization Service,

Appellee.

Jow Chu Yun, on behalf of Jow Kwong Yeong,

Appellant,

vs.

Bruce G. Barber, District Director, Immigration and Naturalization Service,

Appellee.

APPELLANTS' OPENING BRIEF.

Introduction.

These two appeals are prosecuted upon a single record, pursuant to stipulation [Tr. p. 15]. In addition to the printed record, appellants have requested that there be brought before this Court the transcript of testimony before the Board of Special Inquiry of the Immigration Department which was introduced in the Trial Court by reference [Tr. p. 32].

The Jurisdiction of This Court.

Appellants filed in the District Court petitions for writs of habeas corpus alleging therein that they were citizens of the United States in that their father was a citizen of the United States. Their petitions further alleged that they were admitted into the United States on or about October 21, 1951, at San Francisco, California, and that they carried with them for presentation to the Immigration and Naturalization Service a Consular Travel Affidavit, accompanied by a travel authorization stamp duly signed and sealed by Vice Consul James T. Rousseau at Hong Kong, British Crown Colony, the petitions further allege that after proceedings held before a Board of Special Inquiry of the Immigration Service, an order was made to the effect that petitioners had not satisfactorily established their identity and that an order for exclusion was made. The District Court granted the writ of habeas corpus in each case [Tr. p. 10] and after hearing thereon, made its order vacatng the writs of habeas corpus and dismissing the petitioners [Tr. p. 12.] It is from these orders that the present appeals are prosecuted.

The jurisdiction of this Court is provided for by Section 2253 of Title 23 of the United States Code.

Facts.

The petitioner in these two proceedings, Jow Chu Yun, is an American citizen of Chinese origin. His citizenship has been admitted [Tr. p. 9]. The petitions allege that Jow Mun Yow and Jow Kwong Yeong are the sons of petitioner Jow Chu Yun. It is also admitted by the pleadings that if it were established that the latter two individuals are the sons of the petitioner then they are citi-

zens of the United States and are entitled to admission into the United States.

As above indicated, the two young men, who are respectively 19 and 20 years of age, presented themselves at San Francisco on October 21, 1951, with a Consular Traveler Affidavit and a travel authorization stamp issued by the American Vice Consul at Hong Kong. Proceedings were had before the Board of Special Inquiry of the Immigration and Naturalization Service to determine the identity of the young men as sons of an admittedly American citizen, the petitioner in these proceedings, and the Board held that identification had not been established and a final order was made on December 7, 1951, by the Board of Immigration Appeals, affirming the findings of the Board of Special Inquiry.

The proceedings before the Board of Special Inquiry reveal the following admitted facts:

(a) That the petitioner herein is an American citizen [Tr. p. 9];

(b) That the petitioner was in China between November, 1930, and September, 1932, making it possible for him to have been the fatehr of the two boys in question [Tr., Board of Special Inquiry, p. 4];

(c) Petitioner was advised of the whereabouts of his children in China and constantly received letters from his wife during her lifetime and from his sons [Tr., Board of Special Inquiry, p. 10];

(d) Petitioner constantly contributed to the support of his wife and family during their residence in China [Tr., Board of Special Inquiry, p. 11].

In addition to lodging the Transcript of the Board of Special Inquiry of the Immigration and Naturalization Service [Tr. p. 17], there was offered a blood typing test made in San Francisco [Tr. p. 18] which led to the conclusion and opinion of the doctor who made the test that one of the boys was excluded by the test from being the son of petitioner and the other was in the class who could be the son of petitioner. Petitioners also had the Court examine the physical characteristics of petitioner and the two sons [Tr. p. 20].

There is no contrary evidence in the record. There are some conflicts in the record as to the places where the two young men were visited in China by their uncles in the year 1947. Considering the youthfulness of the boys, it can hardly be said that these discrepancies as to places visited in 1947 would create any real conflict in the record or any basis for contrary inferences to the direct testimony of both the petitioner and his two sons.

Legal Issues.

We find ourselves in a legal dilemma. This is not a proceeding under Section 903 of Title 8, United States Code Annotated, which permitted declaratory relief in similar cases. The effect of the McCarran Act was to abrogate and repeal this Section. It is our considered view that we are entitled to the same type of review on habeas corpus that we would have been entitled to under Section 903 of the prior Immigration Law. The Congressional debates indicated that the McCarran Act was a mere codification of the laws relating to immigration and

did not divest anyone claiming American citizenship from any substantial right that he was entitled to under prior law. An examination of Section 1503 of the United States Code Annotated indicates that Congressional debate and Congressional action do not coincide, for in Section 1503 it is provided that judicial review is not available in the case of an exclusion order. We are dealing here, of course, with an exclusion order.

Florentine v. Landon, 206 F. 2d 870, is of little help to either side in this case. That decision merely held that habeas corpus was available where a question of citizenship was involved, but could not be invoked until all administrative processes had been exhausted. It is obvious in this case that administrative remedies had been thoroughly exhausted.

We are concerned as to the nature of the review permitted under the McCarran Act in a habeas corpus proceeding of this nature. Will the weight and sufficiency of the evidence before the Board of Special Inquiry be reviewed or will merely the question of due process of law before that administrative body be reviewed? While this is an important legal question, we do not believe that it is of paramount importance in this matter. In view of the fact that the record in this case contains no contradictory evidence, it is our view that the proceedings before the Board of Special Inquiry of the Immigration and Naturalization Service were arbitrary and capricious and that the findings of fact are entirely contrary to the evidence.

Quantum of Proof.

We are immediately confronted with the question as to the extent that the burden of proof is cast upon petitioners in a case of this kind. We believe that the recent decision of this Court in case No. 13808, decided August 18, 1954, entitled, *Ly Shew v. Dulles,* establishes the correct rule on the burden of proof. We, of course, are not unmindful of the fact that the case arose under the old Section 903 of the Immigration Law of 1940, but we feel that the reasoning in that case is definitely applicable to the facts in the cases here at bar. We believe that the conflict found by the Board of Special Inquiry was unfairly brought about in attempting to pin-point a meeting in 1947, between the young men and their uncles in a place in China, known as Macao. The questions did not relate as to whether the boys had seen the uncles, but it was purely and simply limited to Macao. It appears in the testimony of one of the young men that he was asked the question as to whether he had seen the uncle and he forthrightly testified that he had seen him twice, once in China and then at the airport in San Francisco [Tr., Board of Special Inquiry, p. 53]. We cannot conceive that this Court will find that there was, in effect, contradictory evidence as to the relationship between petitioner father and the two sons, based upon this type of discrediting testimony, and a fair review of the record will indicate that the identity of the two young men and the petitioner was satisfactorily established without any conflicting testimony. We are certainly brought clearly within the language of the decision of this Court in the case of *Ly Shew v. Dulles,* No. 13808, where it appears that the main difficulty with these cases is the large number of them that are pending in the Northern District of California.

Review Not Limited to Merely Formalism of Inquiry.

The leading case on the right of one seeking admission into the United States is *Quon Poy v. Johnson,* 273 U. S. 352, which held, in effect, that habeas corpus would only review the actions of the administrative body to determine whether the Board held a fair inquiry or whether it acted unlawfully or abused its discretion. It is our feeling that in this case the action of the Board was arbitrary and capricious in deciding against uncontradicted testimony.

However, we do not believe that either the District Court or this Court is limited to a mere determination of the formalism of the proceedings before the Board of Special Inquiry, but may examine into the weight and sufficiency of the evidence as it is entitled to do in a deportation matter. We, of course, are at a loss to know exactly what grounds were relied upon by the District Court for its orders do not indicate its reasons.

In this case, it is admitted that the two young men were admitted to the United States under bond. In such event, regardless of the method of entry, upon habeas corpus, the matter must be treated as a deportation matter, giving the right to a full hearing in the United States District Court.

Shaughnessy v. Mezei, 345 U. S. 206;

Conn v. Gottlieb, 265 U. S. 310;

Heikkila v. Barber, 345 U. S. 229;

Rubinstein v. Brownell, 206 F. 2d 449;

Hughes v. Tropello, 296 Fed. 307;

United States ex rel. Vajka v. Watkins, 179 F. 2d 137.

Novelty of the Problem.

We sincerely believe that this is the first case of its kind to arise since the enactment of the McCarran Act. We would be on solid ground were this a proceeding under Section 903 of the Immigration and Nationality Act of 1940, and we feel that were the rules in effect under that statute applied, there would be no question but that the two young men here involved would be declared to be American citizens. We fail to know exactly how to apply the law to this situation in view of the provisions of Section 1503 of the McCarran Act. We, of course, believe that there are several cases that have been decided since the effective date of the McCarran Act that are helpful to the position here urged.

We may start out with the thesis expressed in *Kwock Jan Fat v. White,* 253 U. S. 454, in which the Supreme Court of the United States said:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

This Court had before it almost the identical factual situation as we have here at bar in the case of *Mar Gong v. Brownell,* 209 F. 2d 448. The only difference between that case and those at bar is that the *Mar Gong* case was a proceeding brought under Section 903 of the Immigration and Naturalization Act of 1940. This Court had before it a record from the Immigration Service very similar to the one here involved and this Court had no difficulty in striking down the apparent discrepancies and at page 451 stated:

> "In view of the multitude of details about which inquiry was made, we doubt if any honest witness of

> average intelligence could survive as exhaustive an examination as this and disclose fewer discrepancies in his testimony."

We also feel that in the cases at bar, we have the added difficulty of having used interpreters, which, of course, makes it more difficult to reconcile the answers given by Chinese. We, again, assert that the major difficulty that appellants have to overcome in this case lies in the fact that they are Chinese. It is our position that if they are American citizens, it matters not that they are Chinese and if this is their country, there should be no question of their right to live and dwell in this country and not be deported and excluded to have to suffer the rigors that will be forced upon them when they return to Red China.

Rubinstein v. Brownell, 206 F. 2d 449, is an interesting case in that it definitely suggests, at page 452, that the scope of habeas corpus may be broader than its generally recognized limited application. It is our view that in the cases at bar, we are entitled to judicial review and as we indicated, it is our belief that if the principles of judicial review are applied, that these two boys must remain in the United States as citizens.

Conclusion.

We, in a sense, apologize to this Court for being unable to shed as much legal light on the problem involved that we would like to. We are limited because we have been unable to find any helpful case law as the McCarran Act is relatively new on our statute books. We feel, however, that a review of the entire record will indicate that a substantial injustice is being done to these two young men and that the record before the Court indicates that they are the sons of petitioner and should be permitted to re-

main in the United States on some legal theory. It may be that habeas corpus is a substitute for Section 903 of the old statute. That is a problem which this Court will have to determine.

We respectfully submit that the orders and decrees of the District Court should be reversed and this Court should order that the writs heretofore be issued remain in full force and effect and that the two young men should be given their liberty in the United States.

Respectfully submitted,

BERTRAM H. ROSS,

Attorney for Appellants.

Nos. 14,503 and 14,504

IN THE

United States Court of Appeals

For the Ninth Circuit

JOW CHU YUN, on behalf of
Jow Mun Yow,
Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,
Appellee.

JOW CHU YUN, on behalf of
Jow Kwong Yeong,
Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,
Appellee.

APPELLEE'S REPLY BRIEF.

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Attorneys for Appellee.

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IN THE

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JOW CHU YUN, on behalf of Jow Kwong Yeong,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

APPELLEE'S REPLY BRIEF.

STATEMENT OF FACTS.

Prior to October 21, 1951, upon alleged claims of United States citizenship derived from an alleged

United States citizen father, Jow Mun Yow and Jow Kwong Yeong, each a Chinese person born in China, received from the American Consul at Hong Kong travel authorization to journey to a port of entry of the United States. In accordance therewith they each did travel to the port of San Francisco, California, where they claimed admission to the United States as citizens thereof. On or about October 21, 1951 they were paroled into the United States on bond. Thereafter, in accordance with the applicable laws and regulations of the Immigration and Naturalization Service a hearing was held before a Board of Special Inquiry. Upon the conclusion of said hearing an order excluding Jow Mun Yow and Jow Kwong Yeong was made. Appeals were taken to the Board of Immigration Appeals. The opinions and findings of the Board of Special Inquiry were affirmed, the appeals were dismissed and the order of deportation became final on August 14, 1953.

On March 23, 1954 Jow Chu Yun, in behalf of Jow Mun Yow and Jow Kwong Yeong, filed the petitions for writs of habeas corpus herein and prayed the Court to inquire into the legality and lawfulness of the restraint. On the allegation of paragraph V (Tr. p. 5) of the petition that the Board of Special Inquiry had excluded evidence from the hearing dealing with the blood and paternity tests, the Court below ordered the writ to issue to enable the two claimants to present to the Court the excluded medical evidence. (Tr. p. 17). At the hearing the petitioners introduced the Immigration file, Ex. I (Tr. p. 17) and by stipulation the medical report as Ex. II. (Tr. p. 18.)

JURISDICTION.

The review of the immigration proceeding by the Court below was pursuant to Sec. 360(c) of Public Law 414 (66 Stat. 163-273) of the 82nd Congress, 8 U.S.C. 1503(c).

Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 2253.

QUESTIONS PRESENTED.

Appellant has filed a statement of points (Tr. p. 31) but in his brief has not attempted to frame the questions considered to be presented to the Court on this appeal. Appellee states the questions presented as follows:

(1) Does Sec. 360(c) of Public Law 414 (8 U.S.C. 1503(c)) require a review in habeas corpus proceedings different from the review made by the Court below?

(2) Did the Board of Special Inquiry or the Board of Immigration Appeals act in some unlawful or improper way or abuse their discretion?

STATUTE.

8 *U.S.C.* (Public Law 414, Sec. 360).

> Sec. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the

ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular office that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial

of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings but not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

ARGUMENT.

(1) SEC. 360(c) OF PUBLIC LAW 414 HAS EXPRESSLY LIMITED REVIEW TO HABEAS CORPUS.

Appellant's first comment (Br. p. 4) is "We find ourselves in a legal dilemma", which appellee takes to mean a choice between equally unsatisfactory alternatives. The alternatives are not stated so neither the unsatisfactory nature nor the choice is evident. Two sentences later the following statement is made: "It is our considered view that we are entitled to the same type of review on habeas corpus that we would have been entitled to under Section 903 of the prior immigration law". No attempt is made to support this "considered view"—rather it is disposed of by the statement that Section 1503 of Title 8 USCA (Sec. 360 of Public Law 414) provides "that judicial review is not available in the case of an exclusion order", and that "we are dealing here, of course, with an exclusion order". (Br. p. 5.) After reference to *Florentine v. Landon,* 206 F.2d 870, appellant states, "We are concerned as to the nature of the review permitted under the McCarran Act in a habeas corpus proceeding of this nature". (Br. p. 5.) But "while this is an important legal question, we do not believe that it is of paramount importance in this matter." Appellant then goes on to say "it is our view that the proceedings before the Board of Special Inquiry of the Immigration and Naturalization Service were arbitrary and capricious and that the findings of fact are entirely contrary to the evidence." On page 7 of his brief *Quon Quon Poy v. Johnson,* 273 U.S. 352, is cited as authority. To this we add *United States v. Ju*

Toy, 198 U.S. 253; *Chin Yow v. United States,* 208 U.S. 8, and *Tang Tun v. Edsell,* 223 U.S. 673.

The two claimants in this case were admittedly *excluded* and are to be deported in accordance with the final order. Deportation is involved in both exclusion and expulsion cases. Appellant's statement on page 7 of his brief that the "two young men were admitted to the United States under bond. In such event regardless of the method of entry, upon habeas corpus, the matter must be treated as a deportation matter, giving the right to a full hearing in the United States District Court," indicates that appellant is mistaken in his understanding of the status of the "two young men." They were not admitted to the United States—they were paroled on bond. Within the meaning of the law they are excluded at the limit of the jurisdiction awaiting order of the authorities.

Nishimura Ekiu v. U.S., 142 U.S. 651;
United States v. Ju Toy, 198 U.S. 253;
Kaplan v. Tod, 267 U.S. 228;
Shaughnessy v. Mezei, 345 U.S. 206;
Jew Sing v. Barber, (CA-9), 215 F. 2d 906;
United States v. Spar, (CA-2), 149 F. 2d 881.

Appellant's position on this question is nothing more than a suggestion that Congress shouldn't have changed the law. *Quon Quon Poy v. Johnson* (supra) is accepted as controlling.

(2) THE CLAIMANTS WERE GIVEN A FAIR HEARING AND THE ACTION OF THE BOARD OF SPECIAL INQUIRY AND THE BOARD OF IMMIGRATION APPEALS WAS LAWFUL AND IN THE PROPER EXERCISE OF DISCRETION.

The only real contention of appellant in this appeal is that the Board was arbitrary and capricious in deciding against appellant.

In paragraph V of his complaint (Tr. 5) appellant alleged that the proceedings before the Board of Special Inquiry were "sham"; that "evidence was excluded from said hearing dealing both with blood and paternity tests which would have established that petitioner is the father . . ."

The court below permitted appellant to introduce such evidence into the record. Petitioner's Exhibit No. 2 (Tr. p. 18). The blood tests show that Jow Chu Yun could not be the father of Jow Kwong Yeong. (Tr. p. 20.) But as to Jow Mun Yow "it is not possible to exclude him as the son" (Tr. p. 20), on the tests alone.

The immigration record was introduced into evidence as Exhibit No. 1 (Tr. p. 17.) Counsel for appellant stated to the Court—"We have a record here before your Honor which under the McCarran Act, your Honor is entitled to review on habeas corpus." (Tr. pp. 22-23.) "I think that your Honor is obliged to read this record . . ." (Tr. p. 25.)

The Court below did review "all of the records and files of the administrative hearing, and after a full consideration of all the evidence . . ." ordered the writ vacated and the petition dismissed.

Appellant now asks this Court to review the entire record and to disagree with the Board of Special Inquiry, the Board of Immigration Appeals, and the judge of the District Court. This would be in effect a review of the review.

Appellee respectfully submits that the decision of the Immigration Board of Special Inquiry was not arbitrary or capricious and that the Court below has reviewed all the records and files of the Immigration Service in the manner contemplated by Section 360(c) of the McCarran Act, Public Law 414 (8 USC 1503(c)).

Dated, San Francisco, California,
February 4, 1955.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14506

United States
Court of Appeals
for the Ninth Circuit

ROBERT L. HALL,

Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-19-54

No. 14506

United States
Court of Appeals
for the Ninth Circuit

ROBERT L. HALL,

Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-19-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Defendant and Appellee.

United States District Court, Southern Division, Northern District of California

No. 33225

ROBERT L. HALL,

Plaintiff,

vs.

COPCO PACIFIC, LTD., a Delaware Corporation,

Defendant.

FIRST AMENDED COMPLAINT FOR DAMAGES—PERSONAL INJURIES

Plaintiff for his complaint alleges:

I.

Plaintiff is a citizen and resident of the State of Washington; defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and admitted to do, and is doing, business in the State of California with place of business in the City of San Carlos, County of San Mateo, State of California; the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

II.

At all times hereinafter mentioned plaintiff was employed by defendant in the State of Oregon as a machinery salesman.

III.

That at all times hereinafter mentioned defendant was in default under the Workmen's Compensation Law of the State of Oregon.

IV.

That on the 10th day of December, 1951, defendants supplied to plaintiff a motor vehicle and directed him to transport certain machinery loaded thereon to a customer in the State of Oregon; that contrary to and in violation of Section 102-1601, Oregon Compiled Laws Annotated, defendant failed and neglected to load and secure said machinery as therein required.

V.

That while plaintiff was transporting said machinery in said motor vehicle in accordance with defendant's instructions, by reason of defendant's failure to comply with the above Section 102-1601, Oregon Compiled Laws Annotated, said machinery moved or shifted and caused plaintiff to lose control of said motor vehicle as the result of which there was a collision in which plaintiff was injured;

VI.

That said employment involved risk and danger within the meaning of said Section 102-1601, Oregon Compiled Laws Annotated.

VII.

That by reason of the premises plaintiff sustained severe injuries, including, but not limited to, a fracture of his right thigh bone by reason of which he suffered great physical and mental pain and anguish and possible physical impairment and disability of a permanent nature, to his damage in the sum of One Hundred and Fifty Thousand ($150,000.00) Dollars.

VIII.

Prior to his said injuries plaintiff was a strong, able-bodied man capable of earning and earning the sum of Four Hundred ($400.00) Dollars in his employment as salesman; since his said injuries and by reason thereof, plaintiff has been unable to pursue any gainful employment and will continue to be unable to do so for an indefinite period of time in the future. Plaintiff has suffered a loss of wages in the approximate amount of Ninety-six Hundred ($9,600.00) Dollars and will continue to suffer such loss in the future and has incurred in necessary treatment of his aforesaid injuries, medical, surgical, hospital and nursing expenses in the approximate amount of Six Thousand ($6,000.00) Dollars and will continue to incur such expense in the future.

For a Second Cause of Action, Plaintiff Alleges:

IX.

Plaintiff repleads paragraphs I, II, III, IV, V, VII and VIII hereof and by this reference incorporates the same herein as though at this point set forth in full.

X.

That said employment constitutes a hazardous occupation within the meaning of Sections 102-1701 to 102-1785, both inclusive, Oregon Compiled Laws Annotated.

XI.

That defendants' negligence in the premises was the proximate cause of plaintiff's injuries and dam-

ages as aforesaid and defendant is liable therefor as provided in said Sections 102-1701 to 102-1785, both inclusive, Oregon Compiled Laws Annotated.

Wherefore, plaintiff prays judgment against defendant in the sum of $165,600.00 plus whatever further damages he may suffer in the future as hereinbefore alleged, for his costs of action herein incurred and for such other and further relief as to the Court may seem meet and proper in the premises.

P. H. McCARTHY, JR.,

F. NASON O'HARA,

HERBERT S. JOHNSON,

By /s/ HERBERT S. JOHNSON,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed January 12, 1954.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT FOR DAMAGES, PERSONAL INJURIES

First Defense

Plaintiff has failed to state a claim upon which relief can be granted.

Second Defense

Plaintiff's alleged cause of action against defendant is barred by the statute of limitations.

Third Defense

Any injuries or damages suffered by plaintiff at the time and place referred to in his first amended complaint were proximately caused by his own negligence.

Fourth Defense

Any risk or hazard connected with the work being performed by plaintiff for defendant at the time and place referred to in his first amended complaint was open, obvious and understood and appreciated by him and plaintiff assumed any such risk or danger.

Fifth Defense

Plaintiff was in charge of the work and operation being performed at the time and place referred to in his first amended complaint, and if there was any failure to observe safety requirements, such failure was that of the plaintiff.

Sixth Defense

Defendant admits the allegations of Paragraph I of plaintiff's first amended complaint and that plaintiff was employed by the defendant as a salesman, but denies the other allegations of plaintiff's first amended complaint generally and specifically and the whole thereof; defendant further denies the allegations of the second cause of action thereof generally and specifically and the whole thereof, except as hereinabove admitted, and denies that

plaintiff has been damaged in the sum of $165,600.00 or in any other sum or sums at all.

Wherefore, defendant prays judgment herein.

Dated this 1st day of April, 1954.

KEITH, CREEDE &
SEDGWICK,

/s/ FRANK J. CREEDE,

/s/ SCOTT CONLEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 7, 1954.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
UNDER RULE 56(b)

The defendant moves the Court for summary judgment in its favor on the ground that the Statute of Limitations is a bar to the present action.

KEITH, CREEDE &
SEDGWICK,

By /s/ SCOTT CONLEY,
Attorneys for Defendant.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT UNDER RULE 56(b)

To P. H. McCarthy, Jr., F. Nason O'Hara and Herbert S. Johnson, Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court, at Room 276 of the Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 24th day of May, 1954, at 9:30 o'clock a.m. of said day, or as soon thereafter as counsel can be heard.

KEITH, CREEDE & SEDGWICK,

By /s/ SCOTT CONLEY,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

ORDER

Motion for summary judgment on behalf of the defendant is hereby granted on the ground that the action is barred by Section 340.3 of the California Code of Civil Procedure.

Let defendant prepare judgment accordingly.

Dated: July 6, 1954.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed July 6, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

No. 33225

ROBERT L. HALL,
Plaintiff,

vs.

COPCO PACIFIC, LTD., a Delaware Corporation,
Defendant.

JUDGMENT

Defendant's motion for summary judgment, having come on regularly for hearing, and the court having examined proofs offered by the parties, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed:

1. That defendant Copco Pacific, Ltd., a Delaware corporation, have judgment against plaintiff herein and that plaintiff's action be dismissed, each party to bear his own costs.

Dated: This 13th day of July, 1954.

/s/ O. D. HAMLIN,
United States District Court Judge.

Approved as to form as provided in Rule 5(d).
Receipt of copy acknowledged.

[Endorsed]: Filed July 13, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff, Robert L. Hall, above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of July 6, 1954, granting defendant's Motion for Summary Judgment, and from the Judgment entered herein on the 14th day of July, 1954, and the whole thereof.

/s/ HERBERT S. JOHNSON,
P. H. McCARTHY, JR.,
F. NASON O'HARA,
HERBERT S. JOHNSON,
Attorneys for Appellant

[Endorsed]: Filed July 30, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for both parties:

Complaint for damages.
First amended complaint for damages.

Answer to first amended complaint for damages.
Motion for summary judgment.
Order.
Judgment.
Notice of appeal.
Cost bond on appeal.
Designation of contents of record on appeal.
Statement of points relied upon on appeal.
Designation of additional contents of record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of September, 1954.

C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14506. United States Court of Appeals for the Ninth Circuit. Robert L. Hall, Appellant, vs. Copco Pacific, Ltd., a Delaware Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 7, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals,
Ninth Circuit

No. 14506

ROBERT L. HALL,

Plaintiff-Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware Corporation,

Defendant-Appellee.

STATEMENT OF POINTS RELIED UPON ON APPEAL

Robert L. Hall, plaintiff and appellant above named, states pursuant to Rule 75(d) of the Federal Rules of Civil Procedure that the following points will be relied upon on appeal from the order granting defendant's Motion for Summary Judgment and the Judgment entered herein:

1. The Court erred in granting defendant's Motion for Summary Judgment.

2. The Court erred in granting Judgment herein on defendant's Motion for Summary Judgment.

/s/ HERBERT S. JOHNSON,
P. H. McCARTHY, JR.,
F. NASON O'HARA,
HERBERT S. JOHNSON,
Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 21, 1954.

No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

APPELLANT'S OPENING BRIEF.

P. H. MCCARTHY, JR.,
F. NASON O'HARA,
HERBERT S. JOHNSON,
518 Balboa Building, San Francisco 5, California,
Attorneys for Plaintiff and Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

APPELLANT'S OPENING BRIEF.

This is an action to recover damages for injuries sustained by plaintiff, a citizen and resident of the State of Washington, on the 10th day of December, 1952, in the State of Oregon, during the course of his employment by defendant, a Delaware corporation, with principal place of business in the State of California.

The action was filed on the last day of the two-year period next following the date of injury, within the Oregon statutory period of limitation.

The first amended complaint (Tr. pp. 3-6) alleges that plaintiff was injured when the motor vehicle with

which defendant had supplied him to deliver machinery to a customer in the State of Oregon was involved in a collision because of the failure of the defendant properly to load and secure the machinery which moved or shifted and caused plaintiff to lose control of the motor vehicle. (Tr. pp. 3-6.)

Liability is predicated (1) upon the Oregon Employers Liability Act (Ore. Rev. Stats., Sections 654.035, et seq.) on the ground that the employment of plaintiff involved risk or danger against which defendant had not protected him (Tr. p. 4), and (2) upon the Oregon Workmen's Compensation Act (Ore. Rev. Stats., Sections 656.001, et seq.) on the ground that defendant was in default under that Act and, therefore, liable for negligence in not properly loading and securing the machinery. (Tr. p. 5.)

Defendant answered, denying the material allegations of the Complaint and setting up several affirmative defenses, including that of the statute of limitations, which is the only one pertinent to this appeal. (Tr. p. 6.)

Defendant also moved for summary judgment on the ground that the action was barred by the statute of limitations. (Tr. pp. 8-9.)

The motion was heard on the basis of the first amended complaint alone, no supporting affidavit having been filed, and was allowed on the ground that the action was barred on the face of the complaint by Section 340.3 of the California Code of Civil Procedure. (Tr. p. 9.) A judgment of dismissal was thereafter entered. (Tr. p. 10.)

Plaintiff appeals from the order granting the motion for summary judgment and from the judgment of dismissal. (Tr. p. 11.)

THE QUESTION FOR DECISION.

Counsel for defendant conceded in the Court below that the law of the forum (California) controls in determining the period of limitation upon plaintiff's right to sue.

The only question for determination is whether the law of the forum (California) or the law of the state by which the cause of action was created (Oregon) should control in determining the nature of the cause of action for the purpose of classification under the California statute of limitations, and application of the appropriate section thereof.

The law of the State of California regards both causes of action as being statutory (*Rideaux v. Torgrimson,* 12 Cal. 2d 633, Subs. App. 39 C.A. 2d 273) while under the law of the State of Oregon they are treated as being founded in the common law. (*Shelton v. Paris,* 261 Pac. 2d 856.)

If then in determining the nature of the causes of action, the law of the forum is to control and the causes of action are to be regarded as being purely statutory, the California three (3) year statute of limitations contained in Section 338(1) applicable to actions "upon a liability created by statute * * *" would apply, with the result that plaintiff's action would not be barred. On the other hand, if the nature

of these causes must be determined by Oregon law which holds that they are founded in the common law of negligence, then it is conceded that they would fall within Section 340(3) of the California Code of Civil Procedure, applicable to injuries "caused by the wrongful act or neglect of another * * *", and would be barred.

ARGUMENT.

I.

THIS BEING A DIVERSITY CASE, THE CONFLICT OF LAWS RULES OF THE CALIFORNIA STATE COURTS IS CONTROLLING.

In diversity cases, the Federal Courts are bound to apply the conflict of laws rules of the state of the forum.

In the case of *Klaxon v. Stentor El. Mfg. Co.,* 313 U.S. 486, 85 L. Ed. 1477, the Supreme Court of the United States ruled that a United States District Court sitting in Delaware on a cause of action arising upon a contract executed in New York should have denied interest in accordance with the Delaware law although the New York law allowed interest from the date action was commenced. The Supreme Court said, at page 496:

> "We are of the opinion that the prohibition declared in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, against such independent determinations by the federal courts extends to the field of conflict of laws. *The conflict of laws rules to be applied by the federal court in Dela-*

ware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. *Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.* Subject to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law." (Emphasis added.)

This Honorable Court itself recognized and applied the rule of the *Klaxon* case in the case of *Zellmer v. Acme Brewing Co.,* 184 F. 2d 940, in which it was said at page 942:

"In a diversity case, a federal court is bound to follow the law of the state in which it is sitting, and such reference includes the state's conflict of laws rules as well as the state's internal law. Klaxon Company v. Stentor Electric Mfg. Co., Inc., 1941, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 * * *

"In American and English law it is a general rule that when a foreign cause of action is as-

> serted the law of the forum governs as to the remedy. Statutes of Limitation are generally considered procedural, since ordinarily the law of the forum governs the case * * *". (Emphasis added.)

The law of the forum also controls in the determination of what is substantive and what is procedural.

McMillen v. Douglas Aircraft Corp., 90 F. Supp. 670.

From these decisions, therefore, it is apparent that the answer to the question presented by this appeal must be found in the law of the State of California, the forum.

II.

UNDER CALIFORNIA PRINCIPLES OF CONFLICT OF LAWS, THE LAW OF THE FORUM CONTROLS AS TO ALL PROCEDURAL MATTERS INCLUDING THE DETERMINATION OF THE NATURE OF THE CAUSE OF ACTION.

The California courts have consistently followed the rule adopted by the vast majority of the states that in passing upon causes of action arising elsewhere they will be governed by the *lex loci* only upon substantive matters but will apply the California law upon matters of procedure.

Grant v. McAuliffe, 41 Cal. 2d 859.

In the above case, the question arose as to whether a cause of action based upon the Arizona death statute would survive the death of the tort-feasor under the

California survival statutes (Calif. Civ. Code, Sect. 946, Code Civil Proc., sect. 385 and Probate Code, Sects. 573 and 574) although the Supreme Court of the State of Arizona had held that the action will not survive unless it be commenced prior to the death of the tort-feasor. The California Supreme Court held that under the law of this state the question of survival of actions is purely procedural and that the California survival statutes would, therefore, be applied.

> "Thus, the answer to the question whether the causes of action against Pullen survived and are maintainable against his estate depends on whether Arizona or California law applies. In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. (Loranger v. Nadeau, 215 Cal. 362 [10 P. 2d 63, 84 A.L.R. 1264].) 'No Court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.' (Learned Hand, J., in Guiness v. Miller, 291 F. 769, 770.) But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. *It must, therefore, be determined whether survival of causes of action is procedural* or substantive for conflict of laws purposes.

> *This question is one of the first impressions in this state.* The precedents in other jurisdictions are conflicting. In many cases it has been held that the survival of a cause of action is a matter of substance and that the law of the place where the tortious acts occurred must be applied to determine the question."
>
> * * * * * * *
>
> *"Since we find no compelling weight of authority for either alternative, we are free to make a choice on the merits. We have concluded that survival of causes of action should be governed by the law of the forum.* Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages." (Emphasis added.)

The California Courts have also followed the vast majority of states in holding that statutes of limitation are purely procedural.

Biewend v. Biewend, 17 Cal. 2d 108.

In the case of *Western Coal & Mining Co. v. Jones,* 27 Cal. 2d 819, the California Supreme Court went a step further and held that the sufficiency of an acknowledgment to remove the bar of the statute of limitations would be determined under California law although the Courts of the state where the cause arose had already adjudicated the acknowledgment as being insufficient. The Court said at page 828:

> "The law of the forum rather than where the obligation arose governs statutes of limitation *and their applicability* * * * Therefore, Arizona was applying its own law * * *, not California law

> because the Arizona court was the forum. In the instant case the California court is the forum and we apply our law, which, as we have seen, reaches a different result * * *'' (Emphasis added.)

It is clear from the case last cited that the California Courts regard not only the statute of limitations as being procedural but also all matters incidental to its application.

From the *Western Coal & Mining Co.* case (supra) it is but a short step to the case of *Miller v. Lane,* 160 Cal. 90, in which it was held that the California Courts would also determine the nature of the cause of action itself for the purpose of applying the California statute of limitations.

In the *Miller* case, action was brought to enforce a stockholder's liability under the Colorado Stockholders Liability Act. Under the Colorado law the stockholder's liability was held to be secondary and as such enforceable only in equity. Under the California law the liability is primary and original. If the Colorado law had been controlling, the California statute of limitations would have been four (4) years and the action timely brought. The California Supreme Court, however, held that California law as to the nature of the cause was controlling with the result that the action was barred by the California three (3) year statute. The Court said at page 92:

> ''The statutory law of Colorado, as interpreted by the Supreme Court of that state, makes the liability of a stockholder for a corporation's debts a secondary obligation, to be enforced by a suit

> in equity * * * *The statute of limitations of the state where the suit is brought must govern.* It is clear that we must consider the case at bar as one brought to enforce an original statutory liability and it is equally clear that the cause of action against the defendant arose at least as far back as June 9, 1905, when suit was brought by the creditors against the corporation. *We cannot subject the defendant, who is and for ten years has been a resident of California, to any special law or judicial ruling of the State of Colorado, prescribing the form of action upon his statutory liability for the debts of the corporation of which he was a stockholder. In such an action as this the lex fori must prevail* * * *''' (Emphasis added.)

Thus, under California law, the determination of the nature of the cause of action for the purpose of applying the statute of limitations must be regarded as being purely procedural and the determination must, therefore, be made under California law—not the *lex loci.*

III.

UNDER THE LAW OF THE STATE OF CALIFORNIA BOTH PLAINTIFF'S CAUSES OF ACTION ARE STATUTORY.

Examination of the Oregon's Workmen's Compensation Act and Employer's Liability Act reveals a close similarity to the California Workmen's Compensation Act.

Under both California and Oregon law, the remedy under the Workmen's Compensation Acts is exclusive

unless the employer has failed to secure the payment of compensation to the injured employee.

California Labor Code, Sec. 2801;
Bigby v. Pelican Bay Lbr. Co., 147 Pac. 2d 199.

Under both systems, when the employer has failed to secure the payment of compensation, the employee is given a right of civil action for damages.

California Labor Code, Sec. 3706;
Oregon Rev. Stats., Sec. 656.560(5).

Under both systems, in such civil actions, the old common law defenses of contributory negligence, assumption of risk and fellow servant rule are abolished.

California Labor Code, Sec. 3708;
Oregon Rev. Stats., Sec. 656.324(4).

The Oregon Employer's Liability Act (O. R. S., Sec. 654.035) imposes an additional liability upon employers in any work involving risk or danger to the employee for failure to

> "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices."

Like the cause of action under the Oregon Workmen's Compensation Act, the employee's right to maintain his action under the Oregon Employer's Liability Act is subject to the same restrictions as

the cause of action under the Workmen's Compensation Act, i.e., the employer must be in default or otherwise have forfeited his right to the protection of the Act against suit by the employee. (Oregon Rev. Stats., Sec. 656.006.)

In the case of *Rideaux v. Torgrimson,* 12 Cal. 2d 633, the California Supreme Court held that the employee's cause of action against the employer under the California Workmen's Compensation Act was purely statutory in nature and therefore survived the death of the employer tort-feasor.

> *"By section 29b (Labor Code, sect. 3706) the legislature provided a statutory cause of action for personal injuries quite different from that of the common law.* If an employer fails to secure the payment of compensation, either an injured employee or his dependents may sue the employer, or 'the legal representatives of any deceased employer', for damages. In such an action the plaintiff may attach the property of the employer and is given the benefit of a presumption that the employer was negligent. The employer may not defend upon the ground that the employee was contributorily negligent, or assumed the risk of the hazards attending his employment, or that he was injured through the negligence of a fellow servant.
>
> * * * * * * *
>
> *"The social public policy of the state is declared in the statute, which, it is said, is intended to make effective a complete system of workmen's compensation irrespective of the fault of any party, and also to require full provision for ad-*

equate insurance coverage against the liability to pay or furnish compensation. (Sec. 1.) For those injured employees who find themselves without the protection of the insurance required by the compensation law, the legislature has provided a remedy having somewhat the nature of a penalty. In such a case the burden of proof is largely upon the employer. To escape liability he must prove that he was not guilty of negligence, notwithstanding the presumption to the contrary provided by the statute.

There is sound reason for making such a cause of action survive the death of the employer. By provisions of the statute which cover the subject in detail, an employee's right to compensation continues notwithstanding the death of his employer, and it is clear that the legislature, by its definition of the term 'employer', intended to place an injured employee for whom no compensation has been secured upon the same basis, so far as his right to recover after the death of his employer is concerned, as one who is protected by insurance." (Emphasis added.)

Because of the essential similarity between the California and Oregon systems of workmen's compensation and the identity of purpose behind each of them, there is every reason to believe from the California cases cited above that the California Courts if called upon to construe the Oregon causes of action upon which plaintiff relies, would regard them as being purely statutory for purposes of applying the California Statute of Limitations, the decision of the Oregon Supreme Court to the contrary not-

withstanding, and would apply the California three (3) year period of limitation.

CONCLUSION.

It is submitted that under California law, which must be applied in this case, plaintiff's causes of action are both statutory and subject—not to the one (1) year statute of limitations applicable to common law actions for negligence—but to the three (3) year statute of limitations contained in California Code of Civil Procedure, Section 338(1), applicable to statutory liabilities.

The District Court, therefore, erred in allowing defendant's motion for summary judgment and in making and entering its judgment of dismissal. The judgment and order complained of should be annulled, vacated and set aside and the case remanded to the District Court for trial.

Dated, San Francisco, California,
December 10, 1954.

Respectfully submitted,
P. H. McCarthy, Jr.,
F. Nason O'Hara,
Herbert S. Johnson,
Attorneys for Plaintiff and Appellant.

No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO-PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO-PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

BRIEF FOR APPELLEE.

This is a personal injury action between plaintiff employee and defendant employer; jurisdiction is based upon diversity of citizenship, plaintiff being a resident of Washington and defendant a Delaware corporation doing business in California.

Plaintiff filed his original complaint in the court below on December 10, 1953, alleging injury in Oregon on December 10, 1951. The complaint claims that he was involved in a collision while driving a vehicle belonging to the defendant employer, the collision allegedly being due to the shifting of the vehicle's load.

First Amended Complaint was filed January 12, 1954 (Tr. 3-6) and sets forth two causes of action. The first cause of action is based upon the Oregon Employers' Liability Act, Section 102-1601, Oregon Compiled Laws Annotated (now Section 654.035 et seq., Oregon Revised Statutes), it being alleged that the employment involved "risk or danger" within the meaning of that law. The second cause of action is stated to be based upon the Oregon Workmen's Compensation Act, Sections 102-1701 to 102-1785, Oregon Compiled Laws Annotated (now Oregon Revised Statutes, Section 656.001 et seq.) and is founded upon the theory that defendant is uninsured under the Oregon Workmen's Compensation Act and is therefore subject to suit on a negligence basis.

Defendant thereafter filed its answer (Tr. 6-8) and shortly thereafter moved for summary judgment under Rule 56(b) on the ground that the action is barred by the Statute of Limitations. (Tr. 8.)

The Court below granted defendant's motion and judgment was entered thereon on July 13, 1954. (Tr. 10.)

STATEMENT OF THE CASE.

(1) The original complaint in this action was filed two years to the day from the date of injury.

(2) The parties agree that under the rule of *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 82 Law. Edition 1188, 58 S. Ct. 817, a California Statute of Limitations applies to this action.

(3) The California Statute of Limitations for personal injury actions is one year (California Code of Civil Procedure, Section 340(3)); the statute for actions upon "liabilities created by statute" is three years. (California Code of Civil Procedure, Section 338(1).)

(4) Appellee contends that the State of Oregon has determined (*Shelton v. Paris,* 261 Pac. (2d) 856, 199 Ore. 365) that actions of the type here involved are not "created by statute" and that the Oregon Workmen's Compensation and Employers' Liability Acts are codifications of the common law not creating new causes of action; hence Appellee contends that this action is one for personal injuries and is barred by California Code of Civil Procedure Section 340(3).

(5) Appellant contends that California has determined (*Rideaux v. Torgrimson,* 12 Cal. (2d) 633, 86 Pac. (2d) 826 (subsequent appeal at 39 C.A. (2d) 273)) that the California Workmen's Compensation Act is one "creating liability" and is governed by the three-year statute (California Code of Civil Procedure, Section 338 (1)); that the Oregon statutes here involved should be similarly interpreted by a United States Court in California; and that hence this action is timely as brought within three years from the date liability arose.

(6) The question for this Court to decide is therefore whether a Court of the United States sitting in diversity jurisdiction in California is required to apply Oregon or California law to determine the *nature*

of the cause of action asserted, this being necessary to determine the applicable Statute of Limitations.

ARGUMENT.

(1) UNDER THE DECISIONAL LAW OF OREGON THE LIABILITY SET FORTH IN THE OREGON EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION ACTS HAS BEEN DETERMINED TO BE AN EXTENSION OF COMMON LAW LIABILITY RATHER THAN A LIABILITY CREATED BY STATUTE.

If Oregon law be applicable in the determination of whether or not the causes of action set forth in the First Amended Complaint are statutory or common law in nature, it cannot be doubted that the appropriate Statute of Limitations to apply here is the California one-year statute. (California Code of Civil Procedure, Section 340(3).) This very question has been decided by the Oregon Supreme Court in the case of *Shelton v. Paris,* 261 Pac. (2d) 856, 199 Ore. 365. Because this case is on all fours with the instant action and is of such controlling importance we set it forth here at length as follows:

> "This is an action brought by the plaintiff under the Employers' Liability Act, O.C.L.A. § 102-1601 et seq., against the defendant to recover for personal injuries suffered by the plaintiff while in the employ of the defendant. The plaintiff's complaint generally alleges that the defendant was engaged in logging operations; that he required the plaintiff to ride upon the back of a tractor in a place declared by the Industrial Accident Commission, in the interests of safety to be prohibited; and that as a result thereof on

June 28, 1948, the plaintiff was injured. The complaint was filed January 24, 1951, and the defendant demurred thereto, the principal ground therefor being that the cause of action was not brought within the two year statute of limiations: 'An action * * * for any injury to the person or right of another, not arising on contract, * * *.' § 1-206, subd. 1, O.C.L.A. Upon this ground the demurrer of the defendant was sustained by the trial court, the action was dismissed, and the plaintiff appeals.

"Plaintiff contends that the six year statute of limitations, § 1-204, subd. 2, O.C.L.A., as amended by ch. 492, Oregon Laws 1947, is applicable as the liability is one created by statute.

"(1) The sole question before us is whether or not the Employers' Liability Act, including therein the rules and regulations of the State Industrial Accident Commission, which have the force and effect of law, creates a liability by statute. The test of 'a liability created by statute' is whether or not ' "* * * independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether, independently of the statute, the right of action exists for a breach of the duty or obligation imposed by the state." Wood, Lim. Act. § 39.' State v. Baker County, 24 Or. 141, 146, 33 P. 530, 531. This definition has been generally accepted and approved by the majority of the courts of this country. 37 C.J. 783, Limitations of Actions, § 123; 53 C.J.S., Limitations of Actions, § 83; 25 Words and Phrases, 61, and Cumulative Annual Pocket Part.

"The Employers' Liability Act, § 102-1601, O.C.L.A., provides that all employers engaged in

'any work involving a risk of danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices'.

"Section 102-1228, O.C.L.A., imposes upon every employer the duty to furnish the employee a safe place of employment, together with such tools, safety devices and safeguards as shall be reasonably necessary to protect the life and safety of the employee. This section in general enjoins upon an employer the same duties that were required by the common law. Morandas v. L. R. Wattis Co., 71 Or. 367, 142 P. 537; Hoffman v. Broadway Hazelwood, 139 Or. 519, 10 P. 2d 349, 11 P. 2d 814, 83 A.L.R. 1008.

"Section 102-1601, O.C.L.A., enlarges the requirements of § 102-1228, O.C.L.A., by enjoining upon every employer of labor involving work wherein there is risk or danger to the employees the added requirement that he shall use every practicable protection for the safety of his employees regardless of the additional cost of the suitable safety appliances, material, and devices, subject only as he may be limited by the necessity for preserving the efficiency of the structure, machine, apparatus or device. *The statute increases the burden of the employer in hazardous occupations, but not the liability.* The gist of the action is the same, that is,—liability for negligence, *but no new liability is created by statute, since the liability of an employer for his negligent act*

toward an employee existed in the common law. The Employers' Liability Act substitutes, in hazardous employments, a higher degree of care than the ordinary degree of care prevailing generally in the relationship between master and servant. Coomer v. Supple Investment Co., 128 Or. 224, 274 P. 302; Mallatt v. Ostrander Ry. & Timber Co., D.C., 46 F. Supp. 250, 252.

"Employers not operating under the Workmen's Compensation Act., O.C.L.A. § 102-1701 et seq., in this state are not insurers. 'They are liable for consequences, not of danger, but of negligence * * *'; Adams v. Corvallis & E.R. Co., 78 Or. 117, 128, 152 P. 504, 508; Wychgel v. States Steamship Co., 135 Or. 475, 296 P. 863; Leavitt v. Stamp, 134 Or. 191, 293 P. 414; and if engaged in a hazardous occupation, as in this case, they are deprived of certain defenses. Parrott v. Hanson, 180 Or. 620, 175 P. 2d 169; Camenzind v. Freeland Furniture Co., 89 Or. 158, 174 P. 139. * * *

"This act provides that the commission shall have the power to require the doing by the employer of certain acts and the desisting from certain acts for the safety of his employees. Section 102-1241, O.C.L.A., provides that every order of the commission shall be admissible as evidence in any prosecution for the violation of any of its orders. Section 102-1242, O.C.L.A., provides a penalty for the violation of these orders. The statutes go no further than to permit the commission to require certain acts to be done and to provide punishment for the violation of its orders. In other words, it is permitted to establish a standard of care, which includes the requirement

that certain safety devices be used, to be followed by an employer, but it is not permitted to change his liability to the employee from that which arises out of the negligence of the employer to that of absolute liability as an insurer. The rights granted the commission merely change the measuring stick by which negligence may be determined.

"(3) Ordinarily the standard of due care from which the triers of fact may judge the negligence or non-negligence of an act is the conduct of the reasonably prudent man. Sullivan v. Mountain States Power Co., 139 Or. 282, 9 P. 2d 1038; Fox v. Royce, 194 Or. 419, 242 P. 2d 190. In instances where a legislative body has acted to declare what shall or shall not be done, the triers of fact no longer determine the negligence or non-negligence of a party by comparison with the conduct of a reasonably prudent man, but whether or not the expressed legislative will has been complied with.

"(4) If there has been a violation of the legislative will then negligence is established not by comparison, but as a matter of law. Peterson v. Standard Oil Co., 55 Or. 511, 519, 106 P. 337.

"(3) Independent of the order of the commission, and independent of the Employers' Liability Act, the law has always attached an obligation upon the employer to respond in damages to the employee for his, the employer's negligence. *No new cause of action has been created by the statute, or the rules of the State Industrial Accident Commission, but only a determination of the standard of care to be exercised by the employer toward his employee.*

"The judgment of the lower court is affirmed." (Emphasis ours.)

This case stands for the proposition that the Employers' Liability Act of Oregon is but an extension of a common law remedy and not a new liability created by statute. It follows that insofar as the complaint is based upon this Act, it is subject to California Code of Civil Procedure § 340(3)—the one year statute—and hence is barred. *Furthermore we believe it apparent that this decision is controlling upon a similar interpretation of the nature of the Oregon Workmen's Compensation Act.* Thus the Second Cause of Action in the First Amended Complaint is based upon the premise that the employee has a direct right of action against the employer because of the employer's failure to insure as required by the Oregon Workmen's Compensation Act. It will be seen that the right of action thus set forth is very much the same as the Employers' Liability Act in that in each case the employee is permitted to sue as at common law with the ordinary common law defenses being unavailable to the employer.

The significant feature of both the Employers' Liability Act and the Workmen's Compensation Act is that they do not *create* liability, but merely make certain defenses unavailable against common law rights of action. Accordingly it may be assumed that Oregon regards both its Employers' Liability and Workmen's Compensation Acts as not being statutes creating rights but as being merely codifications of common

law rules. Therefore neither of plaintiff's causes of action is governed by the California Three-Year Statute and the entire action is barred.

That this is a reasonable and proper interpretation of the Oregon laws is indicated by the fact that several other western states having similar legislation have also construed their Workmen's Compensation Acts as not being statutes "creating liability."

For example, in *Peterson v. Sorensen,* a decision of the Supreme Court of Utah, 65 Pac. 2d 12, 91 Utah 507, the Utah Workmen's Compensation Act, stating that

> "Employers who shall fail to comply with the provisions of Section 42-1-44 (relating to the requirement that employers carry insurance or qualify as self-insurers) shall not be entitled to the benefit of this title during the period of noncompliance, but shall be liable under civil action to their employees for damages . . ."

was held to create no new cause of action but to be merely a codification of existing employees' rights. Accordingly, it was held that the Utah statute of limitations governing personal injury actions was controlling rather than the Utah statute involving "liability created by statute". The Utah Court states at page 17 of 65 Pac. 2d.,

> "(4,5) It will doubtless be conceded that unless relieved by the Industrial Act, the employer remains liable for his negligent injury of his employee. There is nothing in the language of section 42-1-57, supra, or elsewhere in the act, which

expressly or by necessary implication deprives an employee of his common-law action against a noncomplying employer for injuries sustained by the former on account of the negligence of the latter. On the contrary, those provisions of the act which deprive the noncomplying defendant employer of the defenses of the fellow-servant rule, assumtion of risk, and contributory negligence, and cast upon him the burden of showing freedom from negligence, are calculated to enlarge rather than to restrict the right of the employee to recover for injuries sustained by him on account of the negligence of the employer. If, in an action by an employee against a noncomplying employer, the former assume and successfully maintain all of the burdens of a common-law action necessary to recover judgment, it is clear that the employee would be entitled to a judgment against the employer notwithstanding the provisions of the Industrial Act. That is to say, the employee is not required to rely on the Industrial Act at all as a basis for recovery against a noncomplying employer. The essence of the cause of action alleged by plaintiff is that he was injured by defendant's negligence. The mere fact that the Industrial Act contains provisions which make it less burdensome for plaintiff to establish his claim and take from defendant certain defenses does not justify the conclusion that the cause of action is one created by statute. Moreover, the noncomplying employer 'shall not be entitled to the benefit of this title during the period of noncompliance.' Section 42-1-54. By pleading the bar of the one-year statute of limitation, the defendant seeks, contrary to the express provisions of the act, to avail himself of the

act. This he may not do. We are of the opinion that this action is not barred by the one-year statute of limitation and that, therefore, the action should not be dismissed."

(Note: In Utah the statute of limitations for liabilities created by statute is one year.)

The Nevada Act has been similarly construed by Judge Foley of the United States District Court for the District of Nevada in *Gonzalez v. Pacific Fruit Express Co.,* 99 Fed. Supp. 1012. The Court states:

"It is defendant's contention that plaintiff's right of action is created by statute in the Nevada Industrial Insurance Act and therefore is within the provisions of the statute of limitations covering liabilities created by statute . . . the right of action asserted by plaintiff is not an action based upon a liability created by statute, other than a penalty or forfeiture. That portion of Section 8524, 1929 N.C.L., providing that an action upon a liability created by statute, other than a penalty or forfeiture can only be commenced within three years has no application here."

In *Beeler v. Butte, etc. Copper Development Co.,* 41 Mont. 465, 110 Pac. 528, it was held that although a cause of action against an employer for damages for personal injuries sustained by an employee as a result of the negligence of a fellow servant, did not exist prior to the passage of Section 5248 of the Montana Code, such action was not a liability created by statute within the provisions of the Code relating to limitations.

The weight of authority therefore supports Oregon's conclusion that the statutes of the type we have here involved do not create liability and that hence actions brought thereunder are not subject to the special limitations periods prescribed for liabilities created by statute.

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(2) SHELTON v. PARIS, SUPRA, IS CONTROLLING HERE BECAUSE UNDER CALIFORNIA CONFLICTS RULES, THE LAW OF THE PLACE OF THE WRONG IS APPLIED IN DETERMINING MATTERS CONCERNING THE CAUSE OF ACTION.

Appellant asserts and we agree that under *Klaxon v. Stentor El. Manufacturing Company,* 313 U.S. 487, 85 Law. Edition 1477, 61 S. Ct. 1020 federal Courts sitting in California are governed by California conflict of law rules as well as California substantive law.

We do not however agree with appellant's contention that California's conflicts rules would have required the application of forum law to the determination of the nature of the causes of action asserted here. We think that if this problem were posed to a California Court, such a Court would be guided by Oregon's interpretation of its own statute as set forth in *Shelton v. Paris,* supra.

Appellant cites *Western Coal and Mining Company v. Jones,* 27 Cal. (2d) 819, 167 Pac. (2d) 719 for the proposition that "the law of the forum governs statutes of limitation and their applicability." This was an action upon promissory notes brought more than four years after maturity of the obligations in which

the defendant asserted that the action was barred by California Code of Civil Procedure, Section 337. Plaintiff contended that the bar of the statute was avoided because of a later acknowledgment and defendant countered with the argument that in a prior action on the same notes in Arizona it had been determined that the acknowledgment was insufficient to toll the statute. The California Court pointed out that statutes of limitation in general are regarded as procedural and hence are controlled by the law of the forum and went on to determine that in California the statute would be regarded as tolled because there was sufficient acknowledgment within the meaning of California Code of Civil Procedure, Section 360.

It is significant to note that both Section 337 and Section 360 are found in Part II, Title II of the California Code of Civil Procedure under the general heading "Time of Commencing Civil Actions" and that as applied in this case may be regarded as a single statute of limitations. Nowhere in the case is there the implication that California as a general rule will disregard a valid interpretation of a statute by a Court of a sister state on the theory that the question of the determination of the nature of the foreign cause of action is "procedural".

Appellant also cites *Miller v. Lane,* 160 Cal. 90, 116 Pac. (2d) 58, an action upon a stockholder's liability, for the proposition that California will look to its own law in determining questions of the type presented here. A reading of the decision in that case shows that the basis of the Court's holding was that the

Colorado judgment could not be honored because no personal service had been obtained upon the California defendant. If cited for the proposition that California law should govern the evaluation of the Colorado cause of action, the case must be regarded as overruled by the more recent decision of the California Supreme Court in *State of Ohio ex rel. Squire v. Porter,* 21 Cal. (2d) 45, 129 P. (2d) 357.

This too was an action to enforce a stockholder's liability by the superintendent of banks of the State of Ohio. It appeared that the action was brought against the defendant stockholder more than three years after the banking corporation involved had become insolvent.

As in our case, it was agreed that the California statute of limitations, in this case Section 359 of the California Code of Civil Procedure, was applicable. This section provides that an action against a stockholder to enforce a liability created by law "must be brought within three years after . . . the liability was created." Noting that the crux of the question was when liability was created, the California court commented upon which law should determine this subsidiary question in the following language:

> "To determine when the liability was created the full faith and credit clause of the United States Constitution (Article IV, Section 1) requires recourse to the applicable constitutional provisions, statutes and decisions of Ohio (Converse v. Hamilton, 224 U.S. 234, 56 L. Ed. 749, 32 S. Ct. 415 . . .)

> "The plaintiff's citation of numerous authorities construing the National Bank Act and other acts similar to the Ohio statute is unavailing for the reason that we are here bound by the Ohio courts' interpretation of the provisions of the Constitution and statutes of that state . . .
>
> "We therefore conclude that under the law of Ohio the stockholders liability here sought to be enforced was created on the 27th day of February, 1933 and that as the action was not brought within three years after that date it is barred by Section 359 of our Code of Civil Procedure."

This case was appealed to the Supreme Court of the United States and certiorari was denied. (318 U.S. 757, 87 L. Ed. 1131, 63 S. Ct. 531.)

To the same effect is *State of Indiana v. Hoffman,* 53 C.A. (2d) 706, 128 P. (2d) 420, also a stockholder's liability case in which the California Court referred to the law of Indiana to determine the date of creation of the liability.

It is therefore submitted that California's conflicts rule in cases involving the interpretation of foreign statutes and the determination of the nature of a cause of action codified thereby is to apply the foreign law for this purpose.

The recent decisions of the California Courts in the *State of Ohio* and *State of Indiana* cases, supra, are supported by a decision of the United States Supreme Court in a similar case *Converse v. Hamilton,* 224 U.S. 234, 56 Law. Edition 749, 32 S. Ct. 415, wherein it is said:

> "Of course we must look to the (foreign states) constitution, statutes and decisions to determine the nature and extent of the liability in question . . ."

There are also other California cases of interest on the general question. Thus in *Loranger v. Nadeau,* 215 Cal. 362, 10 Pac. (2d) 63, which was an action by a guest arising out of an automobile accident in Oklahoma, a California Court applied Oklahoma law which required proof only of ordinary negligence despite a California guest law which requires proof of willful misconduct, stating:

> "It is the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed . . ."

Similarly it is said in *Osborn v. Home Life Insurance Company,* 123 Cal. 610, 56 P. 616, that a California Court will follow the decisions of the highest Court of a sister state in construing a life insurance statute of that state.

Finally in *Wallan v. Rankin,* 173 Fed. (2d) 488, it would appear that this very Court has already determined that California's conflicts rule in these situations is to look to the law of the foreign state. In that decision Judge Healy said:

> "In deciding (the applicable law) a federal court is bound to apply the conflict of law rules obtaining in the state in which the court sits . . . In California, conformably with the general rule, it is held that an action in tort is governed by the law of the jurisdiction where the tort was com-

mitted . . . We turn to Oregon law defining the substantive rights and liabilities of the parties."

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(3) TO APPLY THE LAW OF THE FORUM IN DETERMINING THE NATURE OF THE CAUSE OF ACTION HERE WOULD BE TO DENY FULL FAITH AND CREDIT TO OREGON DECISIONAL LAW.

United States Constitution Article IV, Section 1 provides:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

By virtue of this section conflicts of law in our federal system are harmonized and local law made to apply nationally, for it is because of this section that litigants such as the plaintiff in this action can require the recognition of foreign law by United States Courts sitting in California.

But the full faith and credit clause means much more than that Courts in other jurisdictions should recognize only the legislative acts of the *lex locus delicti.* Obviously a statute is but the bare framework of the law which is given life and substance through the interpretation by judicial decision. The Courts of this country have therefore universally recognized that to give the full faith and credit clause vitality requires a recognition of judicial decisions of a sister state as well as the application of its statutory law. See *Fritz v. Metropolitan Life Insurance Company,* 50 C.A. (2d) 570, 577, 123 P. (2d) 622.

Accordingly Appellee suggests that if as Appellant requests, this Court ignores the interpretive decision of the Oregon Supreme Court in *Shelton v. Paris,* supra, the full faith and credit clause has to that extent been denied application. We believe that this Court can better follow the constitutional mandate expressed in Article IV, Section 1 by giving equal application to the statutory and decisional law of the State of Oregon in this instance.

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(4) CALIFORNIA HAS NO LAW INTERPRETING THE NATURE OF THE CAUSES OF ACTION ESTABLISHED BY THE OREGON STATUTES AND THIS COURT IS SUPPLIED WITH NO STANDARD FOR THE DETERMINATION OF THE QUESTION IF IT SHOULD BELIEVE THE OREGON DECISION INAPPLICABLE.

If, as appellant suggests, forum law should be used to determine the nature of the causes of action established by the Oregon Employers' Liability and Workmen's Compensation Acts it is apparent that this Court will inevitably be placed in the paradoxical position of attempting to interpret a foreign statute although the Courts of the state in which it sits have never had the question before them.

Neither appellant nor appellee have found any case in which California Courts have attempted to define the nature of the actions created by Oregon's statutes and it seems doubtful that such authority exists. As is said in *Traglio v. Harris,* 104 Fed. (2d) 439:

> "It would be a strange situation to determine the existence and extent of the (plaintiff's) right by reference to the law of a state which did not rec-

> ognize such a right. It seems apparent that the existence and extent of such right should be determined by the law of the state which extends it."

To similar effect see the annotation to this case in 127 A.L.R. 813.

Appellant suggests that since there is no California decision interpreting the Oregon law, this Court should attempt to speculate upon what the California Courts would do with this problem by applying the rules set forth in *Rideaux v. Torgrimson,* 12 Cal. (2d) 633, 86 Pac. (2d) 826, wherein the California Court interpreted the California Workmen's Compensation law.

Appellee submits that such a procedure would not only be improper for the reasons already stated, but would be impossible because the California Workmen's Compensation Act is in no sense analogous to the Oregon Employers' Liability and Workmen's Compensation Acts.

In California, unlike Oregon, the Workmen's Compensation Act as codified in the Labor Code of California provides an *exclusive remedy* for employees injured in the course and scope of the employment. The California statutory scheme envisions the complete abolition of all common law remedies and the substitution therefor of a single comprehensive law for the treatment of industrial injuries. Cal. Labor Code §§ 3600, 3601; *Liberty Mutual Ins. Co. v. Superior Court,* 62 C.A. (2d) 601, 145 P. (2d) 344.

On the other hand Oregon has never adopted such a comprehensive statutory scheme. Common law rights of action are still available to injured employees in Oregon and common law defenses may be raised in such actions by the defending employer. The Oregon Workmen's Compensation Act is *elective* in nature, not compulsory, and applies only to certain occupations defined as "hazardous". An employer may elect to accept or reject the act by certain actions and may insure with a State monopolistic fund or with a private insurer. It is only when he fails to reject the act in the manner provided by statute that he is subject to suit under the sections set forth in plaintiff's Second Cause of Action.

The Employers' Liability Act is a completely separate statute having no relation to the Workmen's Compensation Act and again applies only to certain limited employments, those involving "risk or danger".

It will therefore be seen that Oregon has adopted only piece-meal legislation to cover the subject of industrial injuries and that in the words of *Shelton v. Paris,* supra,

> "No new cause of action has been created by the statute . . . but only a determination of the standard of care to be exercised by the employer towards his employee."

Common law and negligence remedies still apply in Oregon and so do common law defenses except where they have ben abolished by statutes such as the Employers' Liability Act and the Workmen's Compensation Act.

Appellant suggests that California's decision in *Rideaux v. Torgrimson,* supra, interpreting its own acts is controlling here; but even a superficial examination of the two statutes shows that they are quite dissimilar and that what California has decided in the *Rideaux* case has no application where the Oregon statutes are concerned.

Thus California had at one time prior to the adoption of the comprehensive workmen's compensation act, a statute known as the Roseberry Act, which was similar to Oregon's Employers' Liability Act in that it abolished certain common law defenses. (A portion of this act is now codified as California Labor Code, Sections 2800-2801.) In a second appeal in *Rideaux v. Torgrimson,* 39 C.A. (2d) 273, 102 P. 2d 1104, the plaintiff attempted to set up a cause of action based upon these Labor Code sections. The District Court of Appeal determined that insofar as this cause of action was concerned the complaint was barred by the statute of limitations, California Code of Civil Procedure Section 340(3) because the Roseberry Act (Labor Code Section 2800) establishes causes of action which are based upon tort.

The second appeal in *Rideaux v. Torgrimson,* 39 C.A. (2d) 273, 102 Pac. (2d) 1104, therefore stands for a proposition exactly opposite to that for which it is cited by appellant here.

We conclude that the *Rideaux* cases provide no guide for the application by this Court of California law to the interpretation of the Oregon statutes at least as far as an interpretation of the Oregon Work-

men's Compensation Act is concerned, and that they affirmatively support appellee's position in regard to the cause of action stated under the Oregon Employers' Liability Act.

CONCLUSION.

The appeal in this case demonstrates that appellant is seeking to have California furnish him the benefits of Oregon law as represented by its Employers' Liability and Workmen's Compensation Statutes, while at the same time he seeks to avoid the burdens of that law as represented by the interpretive decision of the Oregon Supreme Court in *Shelton v. Paris,* supra. Appellee submits that the rules of conflict of laws as they must be applied by this Court do not permit appellant to blow hot and cold in this manner; it is further submitted that if appellant's theory be correct, the result achieved would be denial of full faith and credit to Oregon and consequent denial of due process to the appellee.

Dated, San Francisco, California,
January 31, 1955.

Respectfully submitted,
KEITH, CREEDE & SEDGWICK,
FRANK J. CREEDE,
SCOTT CONLEY,
Attorneys for Defendant and Appellee.

No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

Appellee's entire argument fails because it does not properly distinguish between matters of procedure and matters of substance.

I.

THE CLASSIFICATION OF THE CAUSE OF ACTION FOR PURPOSES OF APPLYING THE CALIFORNIA STATUTE OF LIMITATIONS IS PROCEDURAL AND IS GOVERNED NOT BY OREGON LAW BUT BY CALIFORNIA LAW.

In the last analysis, the only question involved in this appeal is whether the courts of California have the right to characterize or classify a foreign cause

of action for the purpose of applying their own statute of limitations.

As appellee would have it, the California courts do not have this right but are bound by a decision of the Oregon courts (*Shelton v. Paris,* 261 Pac. 2d 856) classifying the cause of action for the purpose of applying their own statute of limitations.

The question, however, was long ago settled by the Supreme Court of the United States in the case of *Bank of U. S. v. Donnally,* 8 Pet. 361, 8 L.ed. 974, which involved an action brought in the United States District Court in Virginia upon a promissory note made in Kentucky. Under the Kentucky law, a promissory note was then regarded as being a specialty enforceable by an action of covenant, while under the law of Virginia, the forum, it was a simple contract enforceable by an action of assumpsit. The action was brought within the time limited by Virginia law for an action upon a specialty but not within the time limited for actions upon simple contracts. The court held that the action was barred by the shorter Virginia statute. Mr. Justice Storey delivered the opinion of the Court saying:

> "The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the law of the country where the contracts are made, or to be performed; but the remedies are to be governed by the laws of the country where the suit is brought; or, as is compendiously expressed, by the lex fori. No one will pretend, that because an action of covenant will lie in Kentucky, on an

unsealed contract made in that state, therefore a like action will lie in another state, where covenant can be brought only on a contract under seal. It is an appropriate part of the remedy, which every state prescribes to its own tribunals in the same manner in which it prescribes the times within which all suits must be brought.* * * *The remedy in Virginia, must be brought within the time, and in the mode, and according to the descriptive character of the instrument known to the laws of Virginia, and not by the description and character of it prescribed in another state.*

"If then it were admitted that the promissory note now in controversy were a specialty by the laws of Kentucky, still it would not help the case, unless it were also a specialty and recognized as such by the laws of Virginia; for the law of the latter state must govern as to the limitation of suits in its courts, and as to the interpretation of the words used in its own statutes." (Emphasis added.)

More recent decisions to the same effect are to be found in the cases of *Burns Mortgage Co. v. Hardy,* 94 Fed. 2d 477, and *Alropa Corp. v. Kirchwehn* (Ohio S.Ct.), 33 N.E. 2d 655, both of which cite the above case with approval.

Also to the same effect is the case of *Miller v. Lane,* 160 Cal. 90, cited at page 9 of appellant's opening brief, in which the Supreme Court of California held that it would classify according to California law an action brought to enforce a stockholder's liability under Colorado law, for the purpose of applying the

California statute of limitations, although the Colorado courts had classified the action differently.

We cannot agree with appellee's contention that *Miller v. Lane* (supra) was overruled by the California Supreme Court in the case of *State of Ohio ex rel. Squire v. Porter,* 21 Cal. 2d 45 (cited at page 15 of appellee's brief) in which the California Supreme Court held that the Ohio law would determine *when the cause of action was created.* The creation and existence of the cause of action goes to the substance of the cause of action itself and is quite a different matter from classification of the cause of action for purposes of applying the statute of limitations. The case of *Miller v. Lane* stands for a different principle and was not even mentioned by the California Supreme Court in the latter decision, let alone overruled.

The other California stockholder's liability case cited by appellee at page 16, *State of Ind. v. Hoffman,* 53 C.A. 2d 706, is distinguishable on the same ground; it also involved the question as to when the cause of action was created.

Similarly the remaining cases cited appellee's brief, pp. 16 and 17) all involved questions going to the substance of the cause of action itself and are therefore not pertinent to the question of simple classification or description of the cause of action which is involved in this appeal.

II.

THE MERE CLASSIFICATION BY CALIFORNIA LAW OF A FOREIGN CAUSE OF ACTION FOR PURPOSES OF APPLYING THE CALIFORNIA STATUTE OF LIMITATIONS DOES NOT DENY FULL FAITH AND CREDIT TO THE LAW OF OREGON.

In the case of *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 73 S.Ct. 856, 97 L.ed. 1211, the Supreme Court reiterated the principle, which has long been the law, that a state by refusing to apply the statute of limitations of the state where the cause arose, which had run, and allowing a recovery under its own law, does not deny full faith and credit to the law of the sister state.

Similarly, it is difficult to see how the mere classification of the cause of action, which is required to be made in order to apply properly the statute of limitations of the forum, could be any more of a denial of full faith and credit than the application of the statute itself, even though contrary to a decision of the sister state classifying the cause for the purpose of applying its own statute of limitations.

It has frequently been held that the full faith and credit clause of the United States Constitution is not violated where the mere construction of a statute is involved, without challenging the validity thereof.

Penn. Fire Ins. Co. v. Gold Issue Min. & Mill Co., 243 U.S. 93, 37 S.Ct. 344, 61 L.ed 610;

Smithsonian Inst. v. St. John, 214 U.S. 19, 29 S.Ct. 601, 53 L.ed. 892.

Finally, it is indicated in the leading case of *Klaxon v. Stentor El. Mfg. Co.,* 313 U.S. 486, 85 L.ed. 1477,

that the full faith and credit clause is not involved where the state courts are merely applying their own rules of procedure, or refusing to apply the procedural rules of the sister state.

III.

THE CALIFORNIA CASE OF RIDEAUX v. TORGRIMSON ESTABLISHES THE STATUTORY NATURE OF APPELLANT'S CAUSES OF ACTION.

The various differences between the Oregon Workmen's Compensation Act and the California Act are actually differences without any legally significant distinctions.

In the first appeal in the case of *Rideaux v. Torgrimson,* 12 Cal. 2d 633, the California Supreme Court pointed out the special features of the employees' right of action under section 29b of the Workmen's Compensation Act (Labor Code, sec. 3706) against the uninsured employer, which to its way of thinking fixed the character of the right as being statutory rather than common law.

These were (1) that the right of action was conditioned upon the employer's failure to insure (2) that the employer's negligence was presumed and (3) that the common law defenses of contributory negligence, assumption of risk and the fellow servant rule were not available to the employer.

With the sole exception of the presumption of the employer's negligence, these are the salient features also of the Oregon Act. The cause of action does

not exist against an employer who has insured (Ore. Rev. Stats., Sec. 656.560 (5)) and the employer has been deprived of the defenses of contributory negligence, assumption of risk and fellow servant rule (Ore. Rev. Stats. Sec. 656.324 (4)).

The fact that the Oregon statute may not supply a complete system of workmen's compensation is immaterial because the right that appellant claims happens to be covered by both the Oregon statute and the California statute.

Prior to the enactment of the compensation laws in California, the employee had a common law action against his employer. The California Compensation Act "extended" (to use the language of the Oregon court in *Shelton v. Paris,* supra) the right of action with certain modifications as did the Oregon Act. But the California court has clearly indicated in the *Rideaux* case that it does not regard this "extension" as continuing the common law nature of the right of action.

It is not necessary, therefore, to speculate about what the California law might be. The Supreme Court of this state has said that the cause of action is statutory.

CONCLUSION.

It is therefore submitted that the classification of appellant's cause of action is a procedural matter which must be determined by California law. The California law holds the cause of action to be statu-

tory. The only part of the California statute of limitations which can properly be applied to the case is, therefore section 338(1) of the Code of Civil Procedure, with its three (3) year period of limitation.

The judgment of the trial court should, therefore, be reversed.

Dated, San Francisco, California,
February 11, 1955.

Respectfully submitted,
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No. 14,506

IN THE

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PETITION FOR A REHEARING.

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Defendant and Appellee.

PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, William E. Orr and Richard H. Chambers, Circuit Judges:

Comes now appellee and petitions for rehearing as follows:

I.

GROUNDS FOR A REHEARING.

It is now apparent from the decision on file herein that in our previous brief we did not sufficiently isolate and discuss the points of law deemed by the Court to be controlling here. Believing as we did that the determination of the nature of the causes of action was a matter for the application of Oregon

law, we did not adequately point out to the Court our reasons therefor, and our contention that the application of California law will in any event produce the same result. Accordingly, our principal grounds for rehearing are:

1. That the decision, while correctly stating that initial characterization is a matter for the forum, erroneously assumes that the determination of the nature of the cause of action is likewise a matter for application of forum law.

2. That examination of applicable California statutory and case law indicates that the cause of action under the Oregon Workmen's Compensation Act properly falls within the one-year statute of limitations.

II.

THE DETERMINATION OF THE NATURE OF THE CAUSE OF ACTION ON THE OREGON WORKMEN'S COMPENSATION LAW IS A MATTER FOR THE APPLICATION OF OREGON LAW.

The decision states:

> "Characterization of actions should be made in accordance with the law of the forum. . . ."

Of course, characterization is not a single-step process. In this case, for example, it is necessary for the Court to arrive at a preliminary delineation of the field of law covered in order that the appropriate conflicts rule may be selected. Thus, the first question

that arises in this action is whether the action lies basically in tort or is *quasi ex contractu* as arising out of the employee-employer relationship. This step in the characterization process is not explicitly discussed in the present decision, although it is obviously necessary in order that the second step—the choice of "connecting factor"—may be made. For example, if this action were initially found to be based on contract, it would be necessary to inquire as to where the contract was made and where it was to be performed; if these places were different, resort to conflicts rules would be necessary to select the controlling law. If the action is initially found to sound in tort, it is usual to select the place of injury as the connecting factor, and to apply the *lex loci delictus.*

Thus, this particular suit unquestionably lies in the general field of tort law; hence, applying California conflicts rules as required by *Klaxon v. Stentor El. Manufacturing Company,* 313 U.S. 486, 487, the Court *next* determines that the appropriate connecting factor is the place of injury. In this case the injury occurred in the State of Oregon and so Oregon law is to be applied in resolving all questions of substance in the case. (See Cormack, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 S. Cal. L.R. 221 *et seq.*)

We quite agree that the question of *initial* characterization described above must be resolved by application of the forum law, for until the problem is classified as to the general field of law applicable, we are at a loss to determine the conflicts rule which

will in turn decide for us whether the forum or foreign law is to be applied to the solution of the principal question.

Thus forum law had to be applied to determine initially that this was a case falling in the general category of torts. This was necessary in order that California conflicts rules could in turn be applied to select Oregon law as applicable because Oregon was the place of injury. However, the Court has assumed that forum law must also apply to determine the nature of the cause of action for the purpose of applying the correct statute of limitations. *But this does not necessarily follow.* The characterization process is not *per se* concerned with this latter question since it is possible to make the general choice of law merely by categorizing the action as one in tort. The "characterization" which "should be made in accordance with the law of the forum" does not preclude a further inquiry to determine which law should define the nature of the cause of action. As to this point, we believe Oregon law must be applied if constitutional principles are to be followed. As we have said in our earlier brief, it seems inconsistent to us that while seeking a remedy which requires the recognition of Oregon statutes, appellant would nevertheless deny the force of Oregon decisional law interpreting those self-same statutes and holding that actions brought thereunder are suits for personal injuries as at common law. To our minds, the faithful application of the full faith and credit clause necessitates the adoption of the case law as

well as the public acts of the foreign state, and hence requires recognition of the Oregon rule that the second cause of action here is not on a liability created by statute.

This Court has noted in its decision that the case of *Shelton v. Paris,* 199 Ore. 365, 261 P. 2d 856, has to do particularly with the Oregon Employer's Liability Act, Oregon Revised Statutes, Section 654.305 *et seq.,* and implies that we cannot also conclude therefrom that actions under the Oregon Workmen's Compensation Law, Oregon Revised Statutes, Section 656.002 *et seq.,* are likewise common law by nature. We should perhaps have noted earlier that in addition to the cases from other jurisdictions cited in our previous brief holding such actions to be common law, there is also a decision of this Court, *Van Norden v. Charles R. McCormick Lumber Company of Delaware,* 27 Fed. 2d 881, 1928, which holds that the Compensation Act does not create a new cause of action. The pertinent language of the Court is as follows:

> "The contention is that, because of another provision of the act withdrawing from the employer so electing, the fellow servant defense available under the common law, plaintiff exhibits a new and distinct cause of action. In this view we cannot concur; *the Compensation Act does not purport to create a new cause of action.* In terms it declares that upon the exercise of such option the 'employer shall be entitled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or

> wrongful act, as if this act had not been passed, and in any action brought against such an employer . . . it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman.' " (Emphasis ours.)

As can be seen from this case, Oregon definitely regards causes of action under the Oregon Workmen's Compensation law such as the one here to be common law in nature and as not being founded upon a new liability created by statute. If, as has been argued, the first *Rideaux* case (*Rideaux v. Torgrimson,* 12 C. (2d) 633, 86 P. 2d 826), means that California holds otherwise as to its somewhat similar statute (California Labor Code, Section 3706 *et seq.*) a clear conflict between California and Oregon law is presented as to the second cause of action here.

We again submit that proper application of the full faith and credit clause demands that Oregon's view of the nature of its own statute be adopted and we deny that the process of characterization necessitates application of forum law as to the principal question involved in this case.

Now are we able to follow the Court's suggestion that to do so would be to allow Oregon to construe California's statute. The meaning of the term "liability created by statute" as used in California Code of Civil Procedure, Section 338(1) is not at issue here, for that statute means just what it says. The only issue is as to the *application* of the statute to

the Oregon cause of action. The resolution of this question is a matter for the application of California conflicts rules (*Klaxon v. Stentor, Etc.,* supra) and as we have argued elsewhere, California in such a situation would apply the foreign law. See *State of Ohio ex rel. Squire v. Porter,* 21 C. 2d 45, 129 P. 2d 357; *State of Indiana v. Hoffman,* 53 C.A. 2d 706, 128 P. 420. In citing merely *Bank of U.S. v. Donnally,* 8 Pet. 361, as sole support for its conclusion the Court fails to indicate that it has followed California conflicts rules in this particular.

III.

IN ANY EVENT CALIFORNIA NOW CONCLUDES, AS DOES OREGON, THAT ACTIONS UNDER THE WORKMEN'S COMPENSATION LAW ARE SUITS AS AT COMMON LAW FOR PERSONAL INJURIES, HENCE TO BE GOVERNED BY THE ONE-YEAR STATUTE OF LIMITATIONS.

This Court in its present decision correctly concludes that there is no conflict of law between Oregon and California as to the purported cause of action under the Oregon Employers' Liability Act, since both states recognize that such actions are not upon a "liability created by statute". *Shelton v. Paris,* 199 Ore. 365, 261 P. 2d 856; *Rideaux v. Torgrimson,* 39 C.A. 2d 273, 102 P. 2d 1104. However, the Court reaches a different conclusion as to the alleged cause of action under the Oregon Workmen's Compensation law, stating that California holds such actions to be statutory in nature and citing the first *Rideaux* case (12 C. 2d 633, 86 P. 2d 826).

Because we did not fully explore the history of the similar legislation in California in our earlier brief, we believe that we should now advert to recent decisions of the California Courts which indicate that the first *Rideaux* decision is no longer good law and that the present view of the California Courts is that actions brought under California Labor Code Section 3706 *et seq.* are not upon a liability created by statute, but are simply extensions of the pre-existing common law right of the employee to sue his employer for personal injuries.

In California at the present, an injured employee has three possible remedies against his employer depending upon his status at the time of the injury:

1. The first and most predominant remedy is a proceeding before the Industrial Accident Commission under the Workmen's Compensation Law, this being the exclusive remedy against the employer where the conditions of compensation concur. California Labor Code Sections 3600, 3601.

2. The second remedy exists in favor of those few persons who are not regarded as employees under the statutory definition of the Workmen's Compensation Act, such an agricultural workers and part-time domestics. Such persons may sue their employers directly as at common law and in such action the doctrine of comparative negligence applies. California Labor Code Sections 2800-2804. It is this type of action which has been likened to the Employers' Liability Act of Oregon and which has properly been held to be an action at common law rather than one upon a liability created by statute.

3. The third type of action arises where the conditions of compensation concur but the employer has nevertheless failed to insure his liability. (California Labor Code, Section 3706 *et seq.*) In such actions negligence of the employer is presumed and contributory negligence is not a defense.

(For a discussion of these remedies, see *Mantonya v. Bratlie,* 33 C. 2d 120, 123; 199 P. 2d 677, and *Devens v. Goldberg,* 33 C. 2d 173, 176; 199 P. 2d 943.)

The first *Rideaux* case was an action of the third type, and the question of applicability of various statutes of limitation was in no way involved. The whole issue was whether a cause of action survived, since the defendant employer died prior to the filing of suit. The California Supreme Court, recognizing the general common law rule that there is no survival of tort actions, nevertheless held that this action survived because by Labor Code Section 3706 the legislature provided a statutory cause of action for personal injuries different from that of the common law. However, the Court also held that the legislation was part of a complete statutory scheme intended to provide full coverage for injured employees, and concluded that by virtue of the legislative intent the action was meant to be one which survived. The reference to Labor Code Section 3706 as providing a statutory cause of action is actually not essential to the *Rideaux* decision, in view of the holding as to the legislative intent. Furthermore, it is no longer necessary to regard such actions as statutory, since

California now follows the rule that actions for personal injuries survive the death of the tort feasor. (C.C.C.P. Sec. 376.)

In any event, the first *Rideaux* case failed to take into account certain provisions of the California Labor Code which indicate that such actions are as at common law, and has apparently since been superseded by more recent decisions holding that a specific statute of limitations must control over a general one.

In California Labor Code, Section 3602, it is said:

> "In all cases where the conditions of compensation do not concur, the liability of the employer is the same as if this division had not been enacted."

This statute has since been construed in *Popejoy v. Hannon,* 37 C. 2d 159, 173; 231 P. 2d 484, where it is said:

> "In all cases where the conditions of compensation do not concur, the liability of the employer is governed by the law of negligence * * * . The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute."

It cannot be doubted that an action such as appellant's first cause of action here is one "not covered by the statute," for California Labor Code, Section 3706, provides:

> "If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by

> filing an application for compensation with the Commission, and in addition may bring an action *at law* against such employer for damages, *as if this division did not apply.*" (Emphasis ours.)

We believe it follows from the foregoing authorities that only the Workmen's Compensation Act itself, with its proceeding before the Industrial Accident Commission, is a liability created by statute in California, and that the other two remedies are simply a preservation of the common law right of the employee against the employer (albeit certain defenses are abolished).

In any event, the recent case of *Aetna Casualty & Surety Co. v. P.G.& E.,* 41 C. 2d 785, 264 P. 2d 5, makes it clear that where a choice exists between a specific statute (such as the statute of limitations for personal injuries) and a general statute (such as the statute of limitations for liabilities created by statute), the conflict must be resolved in favor of the application of the more specific statute.

In the *Aetna* case, the employer's insurance carrier sued a third party, which had allegedly caused the employee's injuries, by virtue of the statutory subrogation provided in the California Labor Code (Cal. Labor Code, Sec. 3850 *et seq.*) The action was brought more than one year but less than three years from the date of the injury. In an effort to secure a recovery for the injured employee as well, the plaintiff insurance carrier joined a cause of action in his behalf, to which a demurrer was sustained upon

the ground of the one-year statute of limitations for personal injuries (C.C.C.P., Sec. 340 (3)). The decision of the Supreme Court of California affirms this conclusion *because the employee's action is one for personal injuries controlled specifically by C.C.C.P. Sec. 340 (3), and the general statute, C.C.C.P. Sec. 338 (1) has no application.* The Court states:

> "The employee's general damage claim, whether prosecuted by the employee personally or by his employer or its insurance carrier on his behalf, is solely one in tort for personal injuries arising out of the negligence of the third party tort feasor; hence the cause of action accrues at the time of the negligent act. No matter who may be the party plaintiff, the cause of action is one within the express terms of subdivision 3 of Section 340 of the Code of Civil Procedure.
>
> "That section is a special statute controlling the time within which any action covering such injury may be commenced, and it prevails over the general statute applicable to actions based upon a 'liability created by statute.' (C.C.C.P. Sec. 338 (1))"

We believe that this decision, although involving other sections of the California Labor Code, makes it clear that the California Supreme Court now regards actions such as the second cause of action here to be controlled by the more specific personal injury statute of limitations and not by the general (and longer) statute of limitations applicable to liabilities created by statute. As is said in *Miller and Lux v. Batz,* 131 Cal. 402, 404, 63 P. 680:

> "The fact that the obligation is *evidenced* by statute does not render the plaintiff's cause of action one 'created' by statute." (Emphasis ours.)

It follows that California now regards suits such as appellant's second cause of action here in the same light as does Oregon, that is, as simple personal injury actions. Thus, whether California or Oregon law be applied to determine the nature of the cause of action, the result is that both causes of action here are barred by California Code of Civil Procedure Section 340 (3).

IV.

IT IS NOT CONCEDED THAT A CAUSE OF ACTION IS STATED BY EITHER COUNT OF APPELLANT'S PRESENT COMPLAINT.

This Court's present decision states:

> "It is conceded by the parties that the allegations of the complaint, as to each cause of action, are sufficient to state a cause of action under Oregon law, which said law allows suit by an injured Oregon employee against his employer in such circumstances as were here alleged."

Although the question of whether or not either count of the present complaint states a cause of action was not raised upon this appeal, we did not mean thereby to concede away what may be a meritorious defense, should this action proceed further. In fact, in our answer to the first amended complaint filed with

the United States District Court on April 7, 1954, it is stated:

"First Defense:

"Plaintiff has failed to state a claim upon which relief can be granted."

The sufficiency of the causes of action stated in the present complaint has not therefore been determined, and it is respectfully requested that the Court amend its present decision to reflect this fact, lest it later be urged by appellant that this point has been stipulated. We do not concede the existence of a cause of action and will raise this question at the appropriate time.

V.

CONCLUSION.

This has been a case of unusual interest from a legal standpoint, being one which goes to the very heart of principles of conflict of laws. Realizing that the best solution to such problems is to harmonize apparent conflicts between the laws of different states, we earnestly suggest that the Court in this case can resolve the apparent conflict either by concluding that Oregon law should apply uniformly to all but the procedural questions or by concluding that both California and Oregon regard their somewhat similar statutes as codifications of existing common law rules and not creators of new liability. It is therefore respectfully submitted that a rehearing should be

granted in this matter for consideration of the questions raised herein.

Dated, San Francisco, California,
September 8, 1955.

Respectfully submitted,
KEITH, CREEDE & SEDGWICK,
FRANK J. CREEDE,
SCOTT CONLEY,
Attorneys for Appellee and Petitioner.

Certificate of Counsel

Scott Conley, of counsel for appellee herein, hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for purposes of delay.

Dated, San Francisco, California,
September 8, 1955.

Scott Conley,
Attorneys for Appellee and Petitioner.

No. 14,507

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT K. BENTON,

Appellant,

vs.

UNITED TOWING CO., a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable Oliver D. Hamlin, Judge.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

I. PRELIMINARY STATEMENT.

The above cause was heard before the Honorable Oliver D. Hamlin, Judge of the United States District Court, all witnesses appearing in person and having testified orally, no evidence was heard by way of deposition.

We respectfully suggest to this Honorable Court that this appeal which involves only issues of fact is merely an attempt to have the cause heard de novo by this Court.

It is not believed that this Court should or will try this case de novo. The rule appears to be well settled that the trial Court is in a better position to judge the credibility and to give weight to the evidence when all the evidence is adduced from witnesses personally present.

Although it has been stated many times that an appeal in admiralty is a trial de novo, the well-established rule has long been recognized that upon such an appeal the findings of the District Court as to the facts will be accepted by the Appellate Court unless clearly against the preponderance of the evidence. *Koehler v. United States,* 7th Circuit 187 F. 2d 933; *Leathem Smith-Putnam Navigation Company v. Osby,* 7th Cir., 79 F. 2d 280; *Drain v. Shipowners and Merchants Tow Boat Company, Ltd., et al.,* 9th Cir., 149 F. 2d 845.

In the case of *Catalina-Arbutus,* 95 F. 2d 283, Judge Denman of this Court stated:

> "While this Admiralty Appeal is a trial de novo, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses save one and his deposition clearly sustains those heard."

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.,* 138 F. 2d 826 wherein it was said:

> "It appears to be impossible to convince the Bar that we will disturb findings of fact as seldom in admiralty causes as in any other. Whether there lingers a notion—never in fact justified—

> that because an appeal in the Admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence, we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this Court."

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellee and against appellant.

Appellant would have this Court, as he unsuccessfully urged the Court below, resort to speculation to sustain his claim of negligence and unseaworthiness. On the record before this Court, a finding of negligence or unseaworthiness would be speculation run riot. As was stated in *Moore v. Chesapeake & Ohio Railway Co.,* 340 U.S. 573, 71 Supreme Court 428, "speculation cannot supply the place of proof."

II. THE ISSUES AS TO UNSEAWORTHINESS.

These were:

(1) the location of the winch created unreasonable and unnecessary dangers to the operator.

(2) There was no spring on the winch to secure the dog when it was disengaged from the gear, creating unreasonable, unnecessary dangers to the operator.

(3) The brake on the winch was exposed to the weather and failed when damp, creating unreasonable and unnecessary dangers to the operator.

III. THE ISSUE AS TO NEGLIGENCE.

Appellant contends that appellee's alleged knowledge of unseaworthiness constituted negligence and that appellee was further negligent in that it had not properly instructed appellant in the operation of the winch in question.

The above contentions are clearly against the preponderance of the evidence and it is respectfully urged that the trial judge's findings must stand.

IV. THE EVIDENCE.

At the time of the accident, appellant, an employee of the United Towing Company, was discharging a barge of oil from United Towing Company barge No. 3 (TR 14). While lowering the cargo hose by use of the winch in question, he was hit in the face by what he assumed to be the winch handle though it was not clear in his mind just what happened at the time he was injured (TR 16, 21, 97, 98). Immediately prior to his accident, he was standing with one foot on the deck of the barge and the other on a pipe which runs in a fore and aft direction (TR 14, 15). At the time of his injury, libellant's height was 6′ 3″. The winch involved in this controversy is permanently fastened to the boom and is used for raising and lowering the hose (TR 382). The height of this winch above the deck is less than 5 feet and the handle of this winch in its topmost position is approximately 5½ feet from the deck (TR 384, 385). This type of winch is in common use in this locality (TR 386). When lowering the hose, the handle is removed (TR 389).

Witness Dixon, who replaced libellant following his injury, operated the winch alleged to have caused libellant's injury within hours of that incident. Defendant's Exhibit E in evidence depicts witness Dixon at this winch with the brake lever in his right hand and the crank handle in his left hand. At the time this picture was taken, Dixon was about 5′ 10½″ in height (TR 430, 431).

Dixon did not see any difference in the operation of the winch following libellant's accident from any other time he had operated it (TR 429). This same witness had never had any difficulty with the operation of winches while working for United Towing Company. He had been working on barge No. 3 for several years prior to libellant's accident (TR 432). Libellant, who at the time of his injury, was 6′ 3″ in height complained that the winch was too high for his particular use (TR 32). Libellant testified that, when operating the winch, you stand with the feet on the deck (TR 249). There is not one scintilla of evidence in the entire record before this Court that the boom to which the winch in question was fastened moved at the time the accident occurred.

It is readily apparent that the location of the winch in question had no causal connection whatever with libellant's injury. Libellant's witness Cross, who had worked on the barge in question for approximately three years prior to libellant's accident, testified that he was 5′ 2″ in height and admitted having made the statement that at no time did he have any difficulty in operating the cargo hose winch on barge No. 3 (TR 356, 362, 366). Though libellant urged that the winch

was too high for his particular use, the physical evidence and the testimony are entirely to the contrary. Witnesses, Dixon and Cross, men of somewhat smaller stature than libellant, were able to operate the winch in question without any difficulty. The lack of evidence that the positioning of the winch was in a dangerous and unsafe position cannot be supplied by argument of counsel.

Let us now consider libellant's contention that the absence of the spring on the dog was the proximate cause of his accident. This dog, which is marked B3 on libellant's Exhibit 7 in evidence, when in place grasps the gear of the winch and prevents it from moving downward. To raise its load, the winch is wound up and in this process, the dog slips over each individual gear and clamps onto an individual gear when the winding process is stopped. To lower the weight attached to the winch cable, the weight is taken off the dog by a slight winding movement of the winch handle, the brake is used to control the load and the dog is then lifted up. With the load under the control of the brake, the winch handle is removed and the load is lowered away with the brake (TR 389). Whether there was a spring attached to this dog or not, it would still be necessary to manually lift the dog from the gear to disengage it. The only purpose of the spring is to hold the dog back away from the gears which is the exact function performed by the mechanism which was attached to the dog B3 at the time of the accident in question.

Witness George who was called as one of appellant's witnesses testified that the proper way to operate this

winch when lowering the hose is to take the handle up and use the brake to lower the boom (TR 132, 133). This same witness further testified that the Appellee Company recommended that, when using the winch to lower the hose, the winch handle should be removed and the load lowered by using the brake (TR 273). Although appellant knew the handle was removable, he never in his experience on Barge No. 3 removed the winch handle (TR 290, 291). In contrast to the proper method of operating this winch, appellant would first release the tension with the winch handle, then release the dog and then lower the load away by the use of the winch handle rather than the brake (TR 16, 17, 19, 20).

Appellant argues that the winch in question was so precariously placed above a maze of pipes that he was unable to get his proper footing to operate the winch. Let us examine the evidence produced by libellant to support this contention. Witness George, who had worked on Barge No. 3, prior to appellant's accident and was familiar with the winch in question (TR 113, 114) testified that it was always possible to stand with both feet on the deck when operating the winch in question (TR 281). He further stated that the only way one should operate such winch is with both feet on the deck (TR 281) and further that one could always operate the winch in question with both feet on the deck (TR 281, 283).

Another contention urged by appellant where the absence of proof is sought to be supplied by argument is that involving the brake. He complains that the

brake slipped when it was wet or damp. Appellant, himself, disposes of this contention and prohibits even the use of speculation that the brake on the winch was even remotely connected with his accident. On the occasion on which he was injured, he did not use the brake on the winch (TR 23). As far as his accident was concerned, the brake was not involved and he was not using it at the time of his injury (TR 326).

Appellant next urges upon this Court that he was not instructed in the operation of the winch. He had been in the employ of Appellee Company for approximately 20 months before his accident (TR 42) performing the same functions as he was performing on the day he was injured. He had been working on Barge No. 3 where he was injured for three weeks before the accident (TR 24). He had worked on several other barges during his employment with this company (TR 42), all of which barges had hand-operated winches used to lower and raise the fuel discharge hoses (TR 43). He had used this same winch previously in the same operation (TR 27). He admits having received training in the operation of the piping and the operation of the valving in the barge (TR 319). Further, he had received training as to the loading, trimming and valving of the barge and in connection with the loading, admits that it was necessary to use the winches to raise and lower the hoses (TR 320). During this training period, he was present when the winches were operated and assisted during such operation (TR 322). During his first 2½ months of employment with the company, which was his ap-

prentice stage, he worked with several of the other men on the barges (TR 322, 323, 324). He knew the winch handle could be removed (TR 325). In his duties as a tanker man, every 15 or 20 minutes or half-hour, according to how fast the barge pumped, it was necessary to lower the cargo hose to get it into horizontal position with the barge (TR 16). Upon his return to work on Barge No. 3, following his injury, he used the same winch without event (TR 107, 313). He continued to work on the same barge, operating the winch, along with his other duties, for two weeks until he was discharged for being intoxicated while on duty (TR 287). In the interim period, there had been no repairs made to the winch in question (TR 288A). Following his return to work, he continued to improperly use this winch in the lowering operations by not taking advantage of the brake (TR 289). Is it not an anomalous situation where it is admitted that a man was trained, and quite extensively, in all operations which he would be required to undertake in the performance of his duties with the singular exception of one of his most important functions, a function he was required to perform every fifteen or twenty minutes or half-hour. Appellee respectfully suggests that the Honorable Trial Court was in a superior position to adjudge the credibility of this witness and the weight to be given his testimony.

Here is a flagrant example of a complete disregard for one's own personal safety by careless and slipshod manner of performing one's duty. Though appellant could and should have safely placed both feet firmly

on the deck before engaging in this operation he chose to stand with one foot on the deck and another, haphazardly, placed on a pipe. And, though this 6′ 3″—225 lb. man complained of the position of the winch, the evidence shows that a co-worker standing only 5′ 2″ in height, and another standing some 5′ 10″ in height, were able to operate this winch without difficulty. After he placed himself in this precarious position, appellant proceeded to misuse a safe and adequate appliance. He totally ignored the brake, as he had in the past and would do in the future. The brake was designed to prevent the thing that appellant claims happened in this instance. He chose to lower away his load by the use of the winch handle rather than remove it and utilize the brake. As libellant claims he must have been hit by the revolving winch handle, a fortiori, there could have been no injury if libellant would have followed the proper procedure of removing such winch handle and using the brake. In one breath, he claims the brake was defective and in the other, proclaims that he always followed this mode of operation, both before and after his injury, and emphatically denied, in many instances throughout the transcript, that the brake had anything whatsoever to do with his accident. Appellant's claim of unseaworthiness, that the winch in question was located on a movable boom, is not supported by one scintilla of evidence that this boom moved to bring about this accident.

There is only one plausible explanation of libellant's injury and this explanation came from the lips of ap-

pellant himself shortly after his accident and while all the facts were still fresh in his mind. In answer to an inquiry of Mr. Dyer, General Manager of the United Towing Company, appellee herein, as to the cause of appellant's injury, appellant stated: "It was just my own damned fault." (TR 377). Again on the same afternoon and before he was taken home, appellant declared to Mr. Rettig, the Port Engineer for Libellee Company, that the winch was in perfect working order, there was nothing wrong with it but that "I was negligent; it was my own damned fault." (TR 403).

V. ARGUMENT.

Libellant could not and does not attempt to rely on res ipsa loquitur to prove the alleged negligence and unseaworthiness. *Asprodites v. Standard Fruit and Steamship Co.,* 5 Cir., 108 F. 2d 728, *Rosenquist v. Isthmian S.S. Co.,* 2 Cir., 205 F. 2d 486.

As was said in *The Aden Maru,* 51 F. 2d 599, 601:

> "This accident occurred solely and entirely as the proximate result of the generally reckless manner in which a dangerous piece of work was being performed by attempting to drag the bail up across the beam knowing that it was bound to foul it unless someone pushed it off, instead of topping the boom for a complete clearance."

Plaintiff relies on a correct principle enumerated in *Petterson v. Alaska S. S. Company,* 205 F. 2d 478. There, while a stevedore was loading a ship, a block which he was putting to a proper use in a proper

manner . . . broke, causing the injuries complained of. It was held proper in such case for the trier of the fact to infer that the block was unseaworthy because (P. 479):

> "If the block was being put to a proper use in a proper manner, as found by the District Judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy."

There is no evidence that it is proper to operate the winch here in question by ignoring the brake and lowering the load by use of the winch handle. On the contrary, this is obviously a negligent abuse of the ship and its appliances (*The Aden Maru* Supra 51 F. 2d 599, 601; *Graham v. Navarchos Koundouriotis,* 1952 A.M.C. 368, 373). Nor is there any evidence to sustain the proposition that if the dog in question had a spring on it rather than the mechanism which was attached to it at the time of the accident that such condition would have prevented the accident. If it is proper to handle the ship's appliances in the manner shown here, libellant should have submitted evidence to that effect. We believe the Court can take judicial notice that this is improper.

Having alleged that unseaworthiness of the winch and the negligence of libellee caused the accident, libellant had the burden of proof. (*Grillo v. United States,* 177 F. 2d 904, 905; *Romano v. United States,* 90 Fed. Sup. 15, 17). He could not sustain this burden by speculation. "Speculation cannot take the place of proof." (*Moore v. Chesapeake & Ohio Railway Com-*

pany, 340 U.S. 573, 578; *Galloway v. United States,* 319 U.S. 372, 395-396; *De Zon v. American President Lines,* 318 U.S. 660; *Patton v. Texas and Pacific Railway Company,* 179 U.S. 658; *Buford v. Cleveland & Buffalo Steamship Company,* 192 F. 2d 196; *Callan v. Cope,* 165 F. 2d 702, 703; *Reese v. Smith,* 9 Cal. 2d 324, 328).

Though the Supreme Court has held that seamen are wards of the admiralty, and the policy is to afford to them the fullest protection, that does not mean, however, that a seaman will get judgment where there is no liability at all. (*Drain v. Shipowners and Merchants Towboat Company,* 149 F. 2d 845). The protection which the law affords seamen has not been extended to allow recovery for injury caused by misuse of the ship's appliances. As said in *Burkholder v. United States,* 60 Fed. Sup. 700, 702:

> "If recovery were to be sustained there would be no reason why it would not be also allowed in a case of misuse or negligent use of sound equipment—exactly the situation in which recovery was denied in the Osceola, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760."

In *Lake v. Standard Fruit and Steamship Company,* 186 F. 2d 354 affirming a judgment of non-suit, the Court stated:

> "It is, of course, settled that damages may be recovered under the Jones Act only for negligence . . . and while we recognize that in passing the Jones Act, Congress did not mean that the standard of legal duty must be the same by land and sea . . . and that in general the employer's duty

> will be broadly construed under it . . . we still do not feel that it is legally incumbent upon the employer to provide an accident proof ship."

In *Ruberry v. United States,* 93 Fed. Sup. 683 where the libellant tried his case on the theory that the respondent was negligent in failing to supply adequate and proper tools for the work ordered to be done, and that he had complained to his superiors prior to the accident that the method employed was dangerous and unsafe, the Court stated:

> "Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable. Jacob v. City of New York, 315 U.S. 752, 758; The Cricket, 9th Circuit 71 F. 2d 61; The Tawmie, 5th Circuit 80 F. 2d 792. The fact that better tool and a better method might have been employed in the task cannot aid the libellant in the absence of a showing that the tool or method actually used was unsafe or unsuitable. . . . There was no evidence that the method used aboard SS Klamath Falls was unsafe or improper and the Court is not in a position to take judicial notice that in maritime circles removing such angle irons by means of a chain fall is unsafe or improper. Proctor for the libellant argues strongly and with much force that such is the case but it goes without saying that argument is never a substitute for evidence."

In *The Tawmie,* 80 F. 2d 792, a libel by seaman for injuries to finger sustained when metal cap covering end of barrel of spray gun came off and seaman cut finger on sharp edge of barrel, the cap of which was

crimped in instead of being held by set screw as in other types of pumps which were on the market, the Court said:

> "It is sufficient if the equipment be that which is reasonably fit and safe for its purpose and reasonably adequate to the place and occasion where used by the direction of the owners. Though a superior type may exist, it appears from the evidence, that the type furnished was reasonably safe and adequate when properly operated . . . This intervening and efficient act of libellant, which the facts and evidence do not condone, was not a contributing cause, it was the sole proximate cause of his injury. Libellant's injury being due, not to any defect in the gun, but solely to his own improper and inattentive use of it, the vessel is not liable for indemnity."

In accord is *The Daisy,* 282 Fed. 172:

> "For a misuse of a proper winch in loading lumber on a vessel causing injury to a seaman the ship is not liable."

And in *The Cricket,* 71 F. 2d 61:

> "While it is the duty of the owner to use due diligence to see that the ship and its appliances are seaworthy, he is not necessarily an insurer of safety, nor is the owner bound to furnish the best, safest and most convenient structures."

And in *The Chico,* 140 Fed. 568:

> "An appliance is reasonably fit when it can be used by the servant in the course of his employment without danger to himself by exercising ordinary care."

Seaworthiness has been defined as the sufficiency of a boat or vessel in materials, construction, function, equipment, officers, crew and outfit for the trade or service in which it is being employed. *McLeod v. Union Barge Line Company,* 95 Fed. Sup. 366, affirmed 3d Cir. 189 F. 2d 610. Seaworthiness or unseaworthiness of a boat and its appurtenant appliances and equipment is a question of fact. Here the specific question of fact for determination by the trial court was whether the winch being operated by the libellant at the time of his injury was faulty and inadequate or reasonably sufficient for the purpose for which it was intended to be used. The trial court found that the winch in question was reasonably sufficient for the purpose for which it was intended to be used.

The law does not require the shipowner to supply the best or perfect equipment and appliances but only those that are reasonably safe and suitable. *Doucette v. Vincent,* 1st Circuit, 194 F. 2d 834; *The Cricket,* 9th Circuit, 71 F. 2d 61; *Ruberry v. United States,* 93 Fed. Sup. 683. The burden of proving unseaworthiness and that such unseaworthiness, if any, was the proximate cause of his injury is upon libellant. *Grillo v. United States,* 2nd Circuit 177 F. 2d 904.

VI. CONCLUSION.

An appeal in Admiralty is a trial de novo; however the qualification of that general rule is just as widely recognized, and that is, that the findings of the District Court will be accepted by the Appellate Court

unless clearly against the preponderance of the evidence. Appellee respectfully urges that the findings of the trial court are clearly sustained by the evidence and the trial court having heard all witnesses testify in person before it and having resolved all material allegations in favor of the appellees and against the appellant, the decree should, for the reasons previously stated, be affirmed.

Dated, San Francisco, California,
November 22, 1954.

JOHN H. BLACK,
EDWARD R. KAY,
GEORGE LIEBERMANN,
APPEL, LIEBERMANN & LEONARD,
Proctors for Appellee
United Towing Company,
A Corporation.

No. 14513.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Appeal of

HENRY S. COHEN

From the Orders of the District Court Requiring Him to Represent Defendants Finn and to Appear *Amicus Curiae.*

OPENING BRIEF ON BEHALF OF HENRY S. COHEN, APPELLANT.

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INTRODUCTORY.

This is an appeal by an attorney from the following two orders made, over his objection, in a *civil* case:[1] (1) An order requiring him to represent the defendants Finn in that action, the Finns having informed the Court and appellant that they did not want him to represent them but, on the contrary, that they desired to appear *in propria persona,* and (2) an order directing appellant to attend all pretrial hearings and the trial of the case as *amicus curiae* and to "assist these defendants (Finn) whenever they will permit."

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[1]No. 14309-WM-Civil, entitled "U. S. v. George C. Finn and Charles C. Finn, *et al.,*" now pending in the District Court at Los Angeles. (Judge Wm. C. Mathes.)

All references in this brief will be to the Reporter's Transcript unless otherwise expressly noted. Numerals refer to the page and, where used, the diagonal mark refers to the line. All italics herein are the writer's unless otherwise expressly noted.

A.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

One of the orders in question was made on August 23, 1954 [20/6; T. R.[2] 49], and the other was made on August 26, 1954 [28-29; T. R. 50]. Notice of appeal was filed on September 8, 1954 [T. R. 54].

The pleadings showing that the orders were made in a civil case are the Government's amended complaint [T. R. 2-17], the Finns' answer thereto [T. R. 18-24], and Charles Finn's cross-complaint [T. R. 25-36].

We contend that the District Court has no jurisdiction to compel an attorney to act as counsel for a litigant in a *civil* case.

The jurisdiction of the District Court to appoint counsel as *amicus curiae* is found in its inherent power. The exercise of this power is judicial.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, U. S. C., Section 1291.

Under the following authorities, the orders complained of are "final decisions" within the meaning of Section 1291.

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[2]"T. R." refers to Transcript of Record.

United States v. Cefaratti (C. C. A. D. C., 1952), 202 F. 2d 13, 91 App. D. C. 297, holds that the words "final decision" as used in Section 1291, are not to be used in a strict and technical sense but should rather be given a liberal and reasonable construction; that although an order is made in the course of an action, it has the finality that is required for appeal under that section if (1) it has a final and irreparable effect on the rights of a party, being a final disposition of a claimed right; (2) it is too important to be denied review; and (3) the claimed right is not an ingredient of the cause of action and does not require consideration with it.

In *Swift & Co. v. Campania Caribe* (1950), 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, it was held that an order made pending the trial, dissolving an attachment on a ship, was appealable. There the Court said (p. 689):

> "Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible (citation). Under these circumstances the provisions for appeals only after final decision in 28 U. S. C., Sec. 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process."

In *Cohen v. Beneficial Loan Corp.* (1949), 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528, it was held that an order made pending suit denying defendant's motion to require plaintiff to give security for reasonable expenses of defendant, was appealable. There the Court said (p. 546):

> "The effect of the statute (Section 1291) is to disallow appeal from any decision which is tentative, in-

formal or incomplete . . . But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken. . . . this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. *When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute (requiring defendants to post security), if it is applicable, will have been lost, probably irreparably.* We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of the case. This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . . *We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.*"

In the present case, as in the *Beneficial Loan* case, *supra,* the orders unquestionably are a final disposition of, and have an irreparable effect on, appellant's rights which are separable from and not an ingredient of the main cause of action, and which do not require consideration with it. The orders are therefore appealable.

B.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

2. The Thirteenth Amendment to the United States Constitution provides:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

3. *Section 1654, Title 28, United States Code,* provides:

> "In all courts of the United States, the parties may plead and manage their own causes personally or by counsel as by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

C.

STATEMENT OF FACTS.

Appellant is an attorney at law who, since 1922, has been and now is licensed to practice as such in all courts of the State of California, and in the United States District Court, Southern District of California, Central Division. Since 1936, appellant has maintained and now maintains offices at 704 South Spring Street, Los Angeles, with his son, Bernard B. Cohen, who is also an attorney.

On July 3, 1952, in the United States District Court at Los Angeles, the Government filed a civil suit entitled

"United States of America, Plaintiff, vs. George C. Finn, Charles C. Finn, *et al.,* Defendants," Action No. 14309-WM, in which the Government sought to recover damages for wrongful detention of an airplane which the Finns had bought from a school district which had previously purchased it from the Government. Subsequently, the Government filed an amended complaint which alleges, among other things, that the Government owns and is entitled to possession of the plane [T. R. 2-17]. Later, the Government seized the plane pursuant to the California Claim and Delivery Statutes [31/22 to 32/13]. On February 16, 1953, the Finns filed their answer in that case *in propria persona* [T. R. 18-24], and *they have never been represented therein by appellant or any other attorney.* On August 23, 1954, both Finns appeared *in propria persona* in Judge Mathes' court to resist the Government's motion to dismiss a cross-complaint [9/3; T. R. 25-36] which Charles Finn had filed in that action.

At the hearing, when the Court asked Charles Finn if they had an attorney, Charles said that they had no attorney in the civil case, that they were appearing *in propria persona* [10/17; see T. R. 49], that Bernard Cohen[3] was the Finns' attorney "in the criminal action" [10/22]. Charles also said, "Now, the Government has been sending correspondence to Bernard Cohen in regard to the civil action, and that is error because Mr. Cohen is not representing us in the civil action at all" [10/23 to 11/1].

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[3]Bernard Cohen is appellant's son who, with appellant, acted as co-counsel for the Finns in a criminal case which was tried in June, 1954, before Judge Edward P. Murphy in the United States District Court at Los Angeles [15/12-14]. The Finns were convicted and their appeal to this court is now pending. (See, *Finn v. United States,* No. 14479.)

When the Court asked who had sent word to the Court concerning the Finns' illness, Charles said, "That was Bernard Cohen"[4] [10/19-22].

During the course of the hearing, when Charles read a portion of a legal citation from a sheet of paper, the Court asked who gave it to him and Charles told the Court that appellant had given him that citation; whereupon, the Court said, *"Well, they aren't going to practice on the outskirts of this Court . . . They aren't going*

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[4]The motion to dismiss the Finns' cross-complaint was originally set to be heard on Monday, August 2, at 10 A. M. [3/3]. About 9:30 P.M. on Sunday, August 1, Dr. Frank Cutler, the Finns' physician, phoned Bernard Cohen at his home, told him that the Finns, who had been seriously ill, were convalescing in Palm Springs and were not well enough to be in court the following day; that he had prepared a letter to that effect and wanted appellant's son to pick it up at his office and deliver it to Government counsel so that the court hearing would be continued. About 7:30 A.M., the next day, Bernard Cohen picked up the letter [T. R. 47] at Dr. Cutler's office and at 8:45 A.M. phoned Government counsel, Mr. Abbott, told him the contents of the letter and stated that he would send it to him. Abbott stated that the letter was not acceptable and insisted that Dr. Cutler either make an affidavit or come to court to testify as to the Finns' condition [3/10-17]. Bernard Cohen then phoned Dr. Cutler, told him what Abbott had said, and Dr. Cutler stated he would be in court at 10:30 A.M. About 10 A.M., Dr. Cutler phoned Bernard Cohen at his office and said that he had been delayed by a patient, that he would be late to court and asked Mr. Cohen to notify the court to that effect. Bernard Cohen then phoned the Court's Secretary and told her that Dr. Cutler would be in Court at 11 A.M. [3/20-23]. Bernard Cohen did not appear in court that day, nor has he ever at any time appeared for or represented either of the Finns in the civil case. In fact, that day, the Court asked Abbott, "Are these defendants Finn represented by counsel in this civil action?" And Abbott replied: "Mr. Cohen has represented them in separate criminal action, but *not in the civil action. He told me this morning he was communicating in this matter as a matter of courtesy and not as representative of them in the civil action"* [4/6-12]. See, Minutes of Court dated Aug. 2, 1954, stating there was *"no appearance"* for defendants [T. R. 46].

to practice law in this Court by indirection,[5] and I will order that they come in and appear on this cross-complaint and I will hear them argue this motion. They aren't going to argue it by remote control" [15/8-19]. When the Court stated it intended to continue the matter for that purpose and asked Charles what date he wanted, Charles said, "That I do not know. I wouldn't know what their cases were; their future calendar is" [15/23], and when Charles attempted to speak further, the Court said, "Usually the lawyer speaks for the client. I am not going to permit a member of the bar of this Court to have his client come in here speaking for the lawyer" [16/3-5]. Charles then said, "Mr. Cohen did not enter the case," and the Court replied, "He has entered it now. *When he gave you that book*[6] *he entered it"* [16/6-8]. Charles suggested that the matter be continued for two weeks "inasmuch as Mr. Cohen must be advised of this," but the Court said, "He will be advised in a hurry. The United States Attorney will tell him to be here next Monday morning" [16/13-16]. After further discussion about dates, the Court continued the matter to Thursday, August 26, and said, "Mr. Henry Cohen and Mr. Bernard Cohen, one or both of them are to be here. If they both want to appear, why, they are both at liberty to appear. *If you*

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[5]We know of no canon of ethics, or Federal or other Rule or Statute which declares or even remotely indicates that an attorney who merely gives a legal citation to a lay person, thereby practices law by "indirection," or on the "outskirts" of the court, or that such conduct on his part is in any way unethical or improper.

[6]The Court's assumption that Charles had read from a book and that appellant had given it to him was erroneous. Actually, Charles merely read from a scrap of paper on which was written a legal citation which appellant had given him several months previously. Appellant did not at any time give either of the Finns any books whatever. [See, 30, 31.]

wish to choose one of them among them to appear, that may be done. One of them will serve as attorney in this case" [17/9-13].

About noon the same day, Mr. Abbott, the Government's attorney, telephoned appellant at his office, informed him of the Court's order and suggested that he appear in Judge Mathes' court at 2 P.M. that afternoon, which appellant did. At that time, appellant told the Court that when appellant and his son had represented the Finns in a contempt case[7] heard by Judge Westover, appellant and his son had informed Judge Westover that neither appellant nor his son ever represented the Finns in the civil case [18/9-13]. The Court then said, "Well, Mr. Cohen, I will just make it very brief. *I never like to see any layman trying to try a lawsuit* . . . he (Charles) was giving me learned dissertations on the law . . . and he told me that you or your son Bernard were the source of it. So I was quick to seize upon your familiarity with the case to appoint you, you or your son; and it doesn't matter which it is" [18/14 to 19/1]. When appellant tried to offer an explanation, the Court interrupted with, "Well, you will have plenty of opportunity to try the case" [19/3], and when appellant asked permission to reply, the Court said, "No, there is no reply. *Do you want to serve yourself, or do you want your son to serve?"* [19/6]. And when appellant said, *"We are compelled to take a case we don't want and can't possibly represent, either one of us, to do those boys justice. I know absolutely*

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[7]About 17 months previously, to wit, in March, 1953, appellant and his son were co-counsel who represented the Finns in a *criminal* contempt trial which was based upon their alleged violation of a certain restraining order. Judge Westover, who heard the case without a jury, acquitted the Finns. [See, T. R. 37-42.]

nothing about the civil case" [19/9], *the Court replied, "You will before it is over . . . This Court is entitled to call upon you and your son for assistance.* I don't care to appoint both of you . . ." [19/12-17]. Appellant then stated that he was "perfectly willing to help the boys, but not in the trial of the case," and then added, "I would rather take it before my son because he can't possibly do it. *I want the record to show it is over my objection"* [19/18-24].

The Court then said, *"You are hereby appointed to represent Charles C. Finn and George C. Finn in case No. 14309 . . . I shall expect you, of course, to do the same as you would if you had a retainer"* [20/6-19].

See, Minutes of the Court dated August 23, 1954 [T. R. 49], appointing appellant "to represent Defendants Finn."

Following that, Government counsel inquired through the Court if August 27 was a convenient time for appellant to attend a conference of counsel which was required by an order the Court had previously made. When appellant stated in substance that he was not familiar with such conferences, the Court said, "Perhaps if you go to the conference you can learn something. There is no requirement that it has to be concluded in a single conference. *You may have to have a dozen conferences"* [21/14]. The Court then directed appellant to appear in Court on August 26 "to argue this motion of the Government to dismiss the cross-complaint" [21/8].

On August 26, in obedience to the Court's order, appellant appeared in Court, and at that time the Finns, who were also present, filed an affidavit stating that *"they do not wish to be represented by Henry S. Cohen*

or Bernard B. Cohen, . . . that representation by any counsel not of their own choosing would be a violation of their Constitutional rights" and that they "choose to appear in propria persona" in the civil case [24/17 to 25/3; T. R. 52].

When appellant asked permission to make a statement supplementing the Finns' affidavit, the Court said, *"It won't do you any good. . . . You are in this case and you are going to stay here; irrespective of what the Finns say, you are going to stay here"* [25/5-7]. Appellant then said, *"I happen to be 75 years old. This case is going to take hundreds of hours. I won't give my life for George Finn or Charles Finn."* Following that, the Court said, *"Do you want your son to come in here?" And when appellant said "No," the Court said, "All right. You are here"* [25/19, to 26/1].

Appellant then attempted, unsuccessfully [25/8], to read a document which the Court ordered filed [26/19] and which is as follows:

"August 26, 1954

"Your Honor, I am present in court at this time in obedience to the order your Honor made last Monday. However, I want to inform the court that since last Monday the defendants have told me that they do not desire to have me represent them in this case, and that they wish to represent themselves.

"I ask that your Honor vacate the order your Honor made last Monday, and that the court relieve me from acting as their attorney in this case on the following grounds:

"First: I respectfully submit—with due deference to your Honor—that the court had no power to make the order requiring me to represent the defendants, when they had not retained me.

"SECONDLY: To compel me to act as their lawyer contrary to their desires would be violative of their right to due process of law guaranteed by the Fifth Amendment of the Federal Constitution, and would be violative of their right to represent themselves, which is a Constitutional right of every citizen of the United States" [26/23, to 27/19; T. R. 53].

After reading the above document, the Court acknowledged the fact that the Finns had the right to appear *in propria persona* [28/3] and when the Court added, *"But you are here as an officer of the court and you will stay here as a friend of the court and assist the court in this civil litigation,"* appellant replied, *"Your Honor, I will be glad to. But your Honor couldn't expect me to spend hundreds of hours as a friend of the court when I have other affairs to take care of, and I cannot officially represent these boys . . ."* [28/6-12].

Appellant then asked the Court to rule on his motion to vacate the order of August 23, and his request for leave to withdraw as the Finns' attorney [28/18], whereupon the following occurred:

"The Court: The Court has ruled. You are here as a friend of the court.

Mr. Henry Cohen: And not representing the Finns?

The Court: *Only to the extent they permit you to.* My experience has been, and we have it here quite frequently in criminal cases, these people who think they want to represent themselves, *if an attorney is available, before very long the attorney is representing them* because they are in water over

their head all the time and they soon discover it, if they have any interest in their lawsuit. . . . * * *

Mr. Henry S. Cohen: . . . So that I understand my position, what your Honor said, I am not required to be here every day to argue this, or —I am talking about the civil case.

The Court: I am speaking about it. *You will be here throughout this civil case as amicus curiae,—*

Mr. Henry S. Cohen: Against my wishes?

The Court: *—and you will assist these defendants whenever they will permit,* and—

Mr. Henry S. Cohen: *Sit here every day?*

The Court: *When it is here.*

Mr. Henry S. Cohen: Just merely present in court?

The Court: You will be helping the court, I trust. You are an officer of this court. *If you wish to remain an officer of this court I trust you will help the court to the best of your ability.*

Mr. Henry S. Cohen: I am going to repeat, I know nothing of the case, and what—

The Court: You can learn about the case.

Mr. Henry S. Cohen: May I make a record?

The Court: You have said all you have to say.

Mr. Henry S. Cohen: *I want to say it is all over my objection.*

The Court: The record will show that every minute of the trial that you are here is over your objection" [28/20, to 30/7].

See, Minutes of the Court dated August 26, 1954 [T. R. 50], wherein the Court orders appellant "to appear in this case as *amicus curiae* at all hearings herein."

Thereafter, when George Finn made a statement regarding a legal point with which the Court did not agree, the Court said, "'A little learning is a dangerous thing,' as the poet said. And you are confusing two entirely different things. If I had time I would try to straighten it out for you, but it is 12:00 o'clock. *Perhaps Mr. Cohen will*" [45/12-15]. And when George continued with his legal argument, the following occurred:

> "The Court: Did you ever read Byron's version on 'A little learning is a dangerous thing'?
>
> Mr. George C. Finn: No, sir but I understand it.
>
> The Court: *You talk it over with Mr. Cohen. He will explain it to you*" [46/1-5].

The Court made an order continuing the pretrial hearing to October 25, 1954 [39/9], and directed that *"You gentlemen hold those meetings and proceed as far as you can under the pretrial procedure"* [46/25, to 47/1]. The date for the trial of the case has not as yet been set.

The Court has never vacated its order of August 23, wherein it appointed appellant to act as attorney for the Finns, or its order of August 26, wherein it appointed appellant *amicus curiae,* and those orders are still in full force and effect.

In obedience to the orders of Court discussed above, appellant was required to and did perform the following services in the civil case to the date of drafting this brief:

(1) August 27—10:30 A.M., appearance at Room 229, Federal Building, Los Angeles, to attend conference of

attorneys representing the Government and certain defendants. Total time, 1 hour, 20 minutes (10:30 to 11:50 A.M.).

(2) The same day, August 27—3 P.M., appearance at the same place to attend another conference of attorneys representing the Government and certain defendants. Total time, 1 hour, 15 minutes (3 to 4:15 P.M.).

> (NOTE: Both Finns attended both conferences mentioned in sub-paragraphs (1) and (2) above, but did not at any time call upon appellant to assist or advise them in any manner whatever. On the contrary, *the Finns stated in the presence of all counsel in attendance that they were capable of handling the conference themselves.*)

(3) September 3—9 A.M., appearance at the same place, to attend the Government's taking of the deposition of Mr. Lanham, an officer of one of the corporate defendants. Only appellant, Mr. Abbott who is Government counsel, and the reporter were present, and appellant waited until 9:45 expecting Lanham to arrive. At 9:45, Abbott said he understood that Lanham failed to appear because his attorney claimed that no subpoena had been served on Lanham. When Lanham did not appear, appellant and Abbott left at 9:45 A.M. Total time, 45 minutes. *Neither of the Finns appeared at all on this occasion.*

(4) The same day, September 3—2 P.M., appearance at the same place, to attend the Government's taking of the deposition of Mr. Batchelor, an officer of one of the

corporate defendants. Appellant was present during the entire proceedings but took no part therein. Total time, 1 hour, 40 minutes (2 to 3:40 P.M.). *Neither of the Finns appeared at all on this occasion.*

(5) September 10—10 A.M., appearance at the same place to attend another conference of attorneys. Total time, 1 hour, 30 minutes (10 to 11:30 A.M.).

(6) The same day, September 10—1:30 P.M., appearance at the same place to attend another conference of attorneys. Total time, 2 hours (1:30 to 3:30 P.M.).

D.

SPECIFICATION OF ERRORS RELIED ON.

1. The Court had no power or jurisdiction to make the order of August 23, 1954, requiring appellant to act as attorney for the Finns in the civil case.

2. The Court had no power or jurisdiction to make the order of August 26, 1954, appointing appellant *amicus curiae* when the obvious purpose and effect of such order was and is to compel appellant to act as the Finns' attorney.

3. The orders violate the Thirteenth Amendment to the United States Constitution which prohibits involuntary servitude.

4. The orders violate due process of law guaranteed by the Fifth Amendment to the United States Constitution.

E.

SUMMARY OF ARGUMENT.

I. The Court had no power or jurisdiction to make the order of August 23, requiring appellant, over his objection, to act as the Finns' attorney in the civil case, when the Finns informed the Court that they did not want him to represent them and that they desired to appear *in propria persona.*

II. The Court had no power or jurisdiction to make the order of August 26, appointing appellant, over his objection, as *amicus curiae* in the civil case, when the obvious purpose and effect of the order was and is to compel appellant to act as the Finns' attorney if and when they desire or permit him to do so.

III. The orders which require appellant, over his objection, to perform legal services for the Finns, if and when they desire or permit him to do so, violate the Thirteenth Amendment to the United States Constitution, which prohibits involuntary servitude.

IV. The orders which require appellant, over his objection, to perform legal services for the Finns, if and when they desire or permit him to do so, deprive appellant of his liberty and property without due process of law guaranteed by the Fifth Amendment to the United States Constitution.

ARGUMENT.

I.

The Court Had No Power or Jurisdiction to Make the Order of August 23, Requiring Appellant, Over His Objection, to Act as Attorney for the Finns in the Civil Case, When They Informed the Court That They Did Not Want Appellant to Represent Them and That They Desired to Appear in Propria Persona.

The Finns advised the Court that they had no attorney in the civil case [10/25], that "Mr. Cohen did not enter the case" [16/6], and that they were appearing *in propria persona* [10/18]. They also filed an affidavit stating that they did not wish to be represented by appellant or his son and that they chose to appear *in propria persona* [24/17; T. R. 52].

Section 1654, Title 28, U. S. C. provides:

> "In all courts of the United States, the parties may plead and manage their own causes personally or by counsel as by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Bocz v. Hudson Motor Car Co. (D. C. Mich., 1937), 19 Fed. Supp. 385, 386, holds that "everyone has a right to appear in his own proper person and represent himself."

Cooke v. Swope (D. C. Wash., 1939), 28 Fed. Supp. 492, 493, aff. 109 F. 2d 955, and *Bankey v. Sanford* (D. C. Ga., 1947), 74 Fed. Supp. 756, 757, aff. 165 F. 2d 788, cert. den. 333 U. S. 847, 92 L. Ed. 1130, 68 S. Ct. 649, hold that the Court cannot force counsel upon a litigant.

Roberts v. Anderson (10th Cir., 1933), 66 F. 2d 874, 876 holds that in any case, civil or criminal, a refusal to permit a party to appear with an attorney of his own

choice "would be a denial of a hearing, and therefore, of due process in the constitutional sense."

See, also, *Swartz v. Swartz* (Tex. Civ. App., 1934), 76 S. W. 2d 1071, 1072; *Arnold v. Fort Worth & D. S. P. Ry.* (Tex. Civ. App., 1928), 8 S. W. 2d 298, 301.

1. Even if the Finns Had Desired Counsel, the Court Had No Power to Appoint Appellant to Act as Their Attorney.

At the outset it should be noted that although the Sixth Amendment to the U. S. Constitution, Rule 44 of Fed. Rules of Crim. Procedure, and Section 3005 of Title 18 U. S. C. give defendants in *criminal* cases the right to assistance of counsel, no comparable Constitutional provision, Rule or Statute affords the same right to litigants in *civil* cases.

In *11 Cyclopedia of Fed. Proc., p. 44,* in discussing the right to the assistance of counsel as provided for in the Sixth Amendment, Federal Rules and Statutes, the writer states:

> "The right to assistance of counsel does not exist in civil or quasi-criminal proceedings."

Brown v. Johnston (9th Cir., 1937), 91 F. 2d 370, holds that since a habeas corpus proceeding is not a "criminal prosecution" within the Sixth Amendment, an indigent prisoner involved therein is not entitled to counsel as a matter of right.

Martino v. Holzworth (8th Cir., 1947), 158 F. 2d 845, holds that in an action for a penalty, although designated quasi-criminal, a defendant is not entitled to assistance of counsel within the provisions of the Sixth Amendment.

Clearly, the Court had no power or jurisdiction to make the order of August 23, appointing appellant as attorney for the Finns.

II.

The Court Had No Power or Jurisdiction to Make the Order of August 26th, Appointing Appellant, Over His Objection, as Amicus Curiae and Requiring Him to Attend All Hearings, Pretrial Proceedings, and the Trial of the Civil Case, When the Obvious Purpose and Effect of Such Order Was and Is to Compel Petitioner to Act as the Finns' Attorney if and When They Desire or Permit Him to Do so.

1. The Sole Function of Amicus Curiae Is to Render Aid to the Court, Not a Litigant.

In *Broome v. Smith* (Tex. Civ. App., 1954), 265 S. W. 2d 897, 899 the Court said:

> ". . . the office of *amicus curiae* could *not be subverted to aid a litigant,* but is restricted to the office of helping the *court only.*"

In *Olcott v. Reese* (Tex. Civ. App., 1927), 291 S. W. 261, the Court said:

> "Clearly the office of *amicus curiae* is to aid the court, and *cannot be subverted to the use of a litigant in the case.* Though the judgment recites that . . . Bland appeared as *amicus curiae,* the facts show that his appearance was that of an interested party."

In *McGhee v. Southwest Industries Co.* (Tex. Civ. App., 1927), 298 S. W. 609, 612, the Court said:

> "This office (of *amicus curiae*) is to aid the *court* and for its personal benefit, and *cannot be subverted to the use of a litigant in the case.*"

In *Clark v. Sandusky* (7th Cir., 1953), 205 F. 2d 915, 917, the Court said:

> "An *amicus curiae* is 'not a party to the action, but is merely a friend of the court whose *sole* function is to advise, or make suggestions to, the *court.*' "

In *Givens v. Goldstein* (D. C. Mun. App., 1947), 52 A. 2d 725, 726, the Court said:

> " 'He (*amicus curiae*) is,' as we have pointed out before, 'not a party to the action, but is merely a friend of the court whose *sole* function is to advise, or make suggestions to, the *court.*' "

In *The Claveresk* (2d Cir., 1920), 264 Fed. 276, 279, the Court said:

> "The phrase *amicus curiae* means one who gives information to the *court* on some matter of law in respect of which the court is doubtful."

In *Kemp v. Rubin* (1946), 64 N. Y. S. 2d 510, 512, 187 Misc. 707, the Court said:

> ". . . the function of an *'amicus curiae* is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration . . . he is not a party, and *cannot assume the functions of a party;* he must accept the case before the court with issues made by the parties, *and may not control the litigation.*"

Bouvier's Law Dictionary defines *"amicus curiae"* as follows:

> "A friend of the court. One who, for the assistance of the *court* gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported or which the judge has not seen or does not, at the moment, recol-

lect . . . *But it is not the function of amicus curiae to take upon himself the management of the cause.*"

Sunderland Cases and Materials on Judicial Administration, page 170, is as follows:

> "An *amicus curiae* is a person who volunteers, in an action in which he is not directly involved, to give suggestions or advice to the *court* upon some matter pending before it, in order that it may not be led into error. Sometimes the *amicus curiae* is invited by the court to make suggestions, in the form of submitted briefs or otherwise, upon matters of public interest in which the court is called upon to deal."

In *State v. Bonner* (Mont., 1950), 214 P. 2d 747, 751, the Court said:

> "An *'amicus curiae'* literally meaning a friend of the court, is a person, whether attorney or layman, who, as a stander-by, when a judge is doubtful or mistaken, may upon leave granted in a case then before him, inform the *court* as to facts and situations that may have escaped consideration or remind the *court* of legal matter which has escaped its notice and regarding which it appears to be in danger of going wrong."

2. The Purpose and Effect of the Order Was and Is to Compel Appellant to Perform Legal Services for the Finns.

Although the Court designated appellant *"amicus curiae,"* in the order of August 26, it is perfectly clear that the purpose and effect of the order in question was and is to compel appellant to perform legal services for the Finns. This is manifest from the following:

(a) The Court said to Charles, "Mr. Henry Cohen and Mr. Bernard Cohen, one or both of them are to be here. If they both want to appear, why, they are both at liberty to appear. *If you wish to choose one of them among them to appear, that may be done. One of them will serve as attorney in this case*" [17/9-13].

(b) Later, when appellant told the Court that neither he nor his son ever represented the Finns in the civil case, the Court said, "Well, Mr. Cohen, I will just make it very brief. *I never like to see any layman trying to try a lawsuit* . . ." [18/14].

(c) The Court also told appellant, "You are hereby appointed to represent Charles C. Finn and George C. Finn in case No. 14309 . . . *I shall expect you, of course, to do the same as you would if you had a retainer*" [20/6-19].

(d) In discussing a pretrial conference of attorneys and the Finns, which was scheduled to take place, the Court said to appellant, "Perhaps if you go to the conference you can learn something. There is no requirement that it has to be concluded in a single conference. *You may have to have a dozen conferences*" [21/14-17].

(e) When appellant asked for a ruling on his motion to vacate the order of August 23 the Court said, "The Court has ruled. You are here as a friend of the court" [28/18-21]. And when appellant asked whether he would be representing the Finns, the Court said, *"Only to the extent they permit you to.* My experience has been, and we have it here quite frequently in criminal cases, these people who think they want to represent themselves, *if an attorney is available before very long the atorney is representing them* because they are in water over their head . . ." [28/22 to 29/4].

(f) The Court also told appellant, "You will be here throughout this civil case as *amicus curiae* . . . and *you will assist these defendants whenever they will permit* . . ." [29/12-16].

(g) Later, while George was discussing some law, the Court said, ". . . you are confusing two entirely different things. If I had time I would try to straighten it out for you, but it is 12:00 o'clock. *Perhaps Mr. Cohen will*" [45/12-15].

(h) Still later, when George continued with his legal argument, the following occurred:

> "The Court: Did you ever read Byron's version on 'A little learning is a dangerous thing'?
>
> Mr. George C. Finn: No, sir, but I understand it.
>
> The Court: *You talk it over with Mr. Cohen. He will explain it to you*" [46/1-5].

The above authorities make it clear that an *amicus curiae* is one whose *sole* function is to aid the *Court,* not a litigant. Since the *only* function of an *amicus curiae* is to aid the *Court,* it logically follows that a judge has no power or jurisdiction, under the guise of appointing an attorney as *amicus curiae,* to compel the attorney to perform legal services for a litigant in a civil case.

Thus, in the present case, the Court had no power or jurisdiction, under the guise of appointing appellant as *amicus curiae,* to compel him to attend all hearings, pretrial proceedings, and the trial of the case, when the real purpose and effect of that order was and is to require appellant to represent the Finns *"to the extent they permit you to"* [28/23], and to compel appellant to *"assist these defendants whenever they will permit"* [29/15].

III.

The Orders Which Require Appellant, Over His Objection, to Perform Legal Services for the Finns, if and When They Desire or Permit Him to Do so, Violate the Thirteenth Amendment to the United States Constitution Which Prohibits Involuntary Servitude.

Arthur v. Oakes (7th Cir., 1894), 63 Fed. 310, 317, 11 C. C. A. 209, holds:

> "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such restraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction."

Heflin v. Sanford (5th Cir., 1944), 142 F. 2d 798, 799, holds:

> "Whether appellant was to be paid much, or little or nothing, is not the question. It is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment. Compensation for service may cause consent, but unless it does it is not justification for forced labor."

Black's Law Dictionary defines "involuntary servitude" as:

> "The condition of one who is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not."

Henderson v. Coleman (1942), 150 Fla. 185, 7 So. 2d 117, holds that where there is no contractual relation between a union and a truck operator, an injunction re-

quiring union members to load trucks of such operator would violate the Florida constitutional provision against "involuntary servitude."

> (NOTE: The Florida constitutional provision is substantially the same as the Thirteenth Amendment to the United States Constitution.)

It is elementary that a lawyer, like persons engaged in other businesses and professions, has the Constitutional right, in the absence of Statute or Rule of Court, to select those individuals for whom he desires to render his personal services. As was said in *Adair v. United States* (1907), 208 U. S. 161, 173, 28 S. Ct. 277, 52 L. Ed. 436, "'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice . . .'"

To our knowledge, the only provisions which relate to the appointment of counsel for litigants in Federal courts are those found in the Sixth Amendment to the United States Constitution, Rule 44 of Federal Rules of Criminal Procedure, and Section 3005 of Title 18, United States Code, and those provisions relate only to the rights of defendants in *criminal* cases to the assistance of counsel. The fact that no comparable Constitutional provision, Rule or Statute affords the same right to litigants in *civil* cases, and that the authorities hold that the right to assistance of counsel does not exist in civil or quasi-criminal proceedings (11 Cyc. Fed. Proc., p. 44, and cases cited), is a strong indication that the courts have never had the power to compel any attorney, against his will, to render services for a party to a *civil* action.

It follows that the orders in question which require appellant, over his objection, to perform legal services for the Finns if and when they desire or permit him to do so, place appellant in a condition of involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution.

IV.

The Orders Which Require Appellant, Over His Objection, to Perform Legal Services for the Finns, if and When They Desire or Permit Him to Do so, Deprive Appellant of His Liberty and Property Without Due Process of Law in Violation of the Fifth Amendment to the United States Constitution.

Appellant stated "that the court had no power to make the order requiring me to represent the defendants, when they had not retained me" [27/9-12]. And when the Court, over appellant's objection [19/24; 30/4]; made an order appointing him as attorney for the Finns, the Court said, *"I shall expect you, of course, to do the same as you would if you had a retainer"* [20/18].

In *Adair v. U. S.* (1907), 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436, in discussing the provisions of the Fifth Amendment declaring that no person shall be deprived of liberty or property right without due process of law, the Court said (p. 172):

> *"Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor . . ."*

In *Adkins v. Children's Hospital* (1923), 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, the Court said (p. 545):

> "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (Fifth Amendment) is settled by the decisions of this court and is no longer open to question (citations). Within this liberty are contracts of employment of labor."

In *Morehead v. N. Y. ex rel. Tipaldo* (1936), 298 U. S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, the Court said (p. 610):

> "The right to make contract about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee fixing the wages to be paid."

See, also, *Coppage v. Kansas* (1914), 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441; *Fischer v. Richard Gill Co.* (Tex. Civ. App., 1952), 253 S. W. 2d 915, 918; *Green v. Samuelson* (1935), 168 Md. 421, 178 Atl. 109; *Commonwealth v. Boston Transcript Co.* (1924), 249 Mass. 477, 144 N. E. 400.

It seems clear that a lawyer, like anyone else, has the Constitutional right, in the absence of some Statute or Rule of Court, to use his own discretion in selecting those individuals for whom he desires to render his services. And if he has that right, he certainly has the privilege, in the absence of some Statute or Rule of Court, to make his own contracts for the sale of his own services.

As we pointed out in Section III above, the fact that the Sixth Amendement to the Constitution, Rule 44 of Fed. Rules of Crim. Proc., and Section 3005 of Title 18,

U. S. C., give to defendants in *criminal* cases the right to assistance of counsel, and that there is no comparable Constitutional provision, Rule or Statute which affords the same right to litigants in *civil* cases, is a strong indication that the Courts have never had the power to compel an attorney, against his will, to render services for a party in a *civil* action.

It follows that the orders in question which require appellant, over his objection, to perform legal services for the Finns if and when they desire or permit him to do so, deprive appellant of his liberty and property without due process in violation of the Fifth Amendment to the United States Constitution.

CONCLUSION.

Appellant, who will be 75 years old on his next birthday [25/21], is engaged in a one-man law practice which requires his full time and attention. Although he maintains offices with his son, they are not partners, and appellant has no law clerk or other assistant to aid him in handling the many cases and other matters now pending in his office. With the exception of the Finn *criminal* case[8] mentioned above and a few bankruptcy matters, appellant has represented no litigants in the past 20 years who were parties in cases pending in the U. S. District Court, and appellant is not famliar with the practice or procedure now followed in that court.

---

[8]In the Finns' criminal case, appellant did not examine any of the witnesses, make any objections, or present any arguments to the court or jury, nor did he take any active part in the trial of that case, except to assist his son at the counsel table.

In affiant's opinion, the preparation and trial of this case will involve hundreds of hours of work on appellant's part, and he so informed the trial court [25/21; 28/10]. Appellant respectfully submits that it is extremely burdensome, unfair and unjust, under the circumstances here involved, to compel him to comply with the orders in question.

For many reasons stated in this brief, appellant requests that said orders, and each of them be reversed, vacated and set aside.

Respectfully submitted,

HENRY S. COHEN,

In Propria Persona.

No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

James Arena, hereinafter referred to as appellant, was indicted on June 3, 1953, in the United States District Court for the Northern District of California (hereinafter referred to as the "Court below") and purportedly charged with perjury committed before a Federal Grand Jury (Title 18 U.S.C., Section 1621). Following a trial by jury, appellant was convicted and sentenced to three years imprisonment (R. 33-34).

This is an appeal from the judgment of that Court entered on August 11, 1954. Notice of appeal was filed on August 11, 1954 (R. 35). The appeal was timely.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of the District Court:

Title 18, U.S.C., Section 3231, provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

The statute sustaining jurisdiction:

Title 18 U.S.C., Section 1621, provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

2. The jurisdiction of this Court upon appeal:

Title 28, U.S.C., Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28, U.S.C., Section 1294 (1) provides:

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

3. The pleadings necessary to show the existence of jurisdiction:

(a) The indictment (R. 3-7)

(b) The motion to dismiss indictment (R. 12-15)

(c) The order of the Court below denying the motion to dismiss indictment (R. 8)

(d) The motion in arrest of judgment (R. 31)

(e) The order denying motion in arrest of judgment (R. 32)

(f) The judgment and commitment (R. 33, 34)

(g) The notice of appeal (R. 35)

(h) Statement of points on appeal (R. 243-247).

4. The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:

In the introductory portion of this brief, these facts have been concisely stated and will be treated more fully in the subsequent development of the facts of the case. Thus, to avoid repetition, the statement is omitted here.

STATEMENT OF THE CASE.

The indictment.

The Grand Jury returned an indictment in the Court below charging appellant in two counts with violations of Section 1621 of Title 18 U.S.C. The Court entered a judgment of acquittal on the second count. The only count that need be considered is the first count.

This count alleges as follows:

> "(1) That on the sixth day of May, 1953, the United States Grand Jury for the Northern District of California, Southern Division, March, 1953, term, engaged in the hearing of the matter of income tax liability of Arthur H. Samish and Frank X. Flynn, in the United States Courthouse and Post Office Building, San Francisco, California, within the jurisdiction of this Court, called before it as a witness James Arena, the defendant herein, who took an oath, administered to him by Charles W. W. St. John, Foreman of the Grand Jury, that he would testify to the truth, the whole truth, and nothing but the truth, and then and there gave testimony including that which will be particularly referred to hereafter in this indictment.
>
> (2) That at the time of the administering of the oath, and at the time of the giving of the testimony, as above stated, the Grand Jury was conducting a hearing which was authorized by law; it was a competent tribunal before which such oath might be administered and such testimony given; its Foreman who administered the oath was authorized to do so; and the hearing was a case in which the law authorized such oath to be administered.
>
> (3) That on May 6, 1953, at San Francisco, in the Southern Division of the Northern District of

California, within the jurisdiction of this Court, under the circumstances above set forth, James Arena, late of Oakland, California, wilfully, knowingly, and contrary to his oath, testified in a material matter, in answer to questions propounded at said proceedings, as follows:

Q. (by Mr. Olney). I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollars bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turned counted the $38,000 in these one thousand dollars bills to you and give you the bills.

A. I didn't get them, sir.

Q. Did that happen? A. No, sir.

Q. Anything like it? A. No, sir.

Q. Did you ever go there to the bank with this Baskins?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Q. Has Mr. Baskin ever delivered any money to you? A. No, sir.

Q. Even one cent? A. Never had occasion to.

Q. (by Mr. Burke). Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

A. That's correct, Mr. Burke.

Q. (by the Foreman). Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir.

Q. And you never received $38,000 from Mr. Baskin? A. No, sir.

(4) That in truth and fact, as the defendant James Arena then and there well knew and believed, the foregoing testimony was false.

(5) That the questions asked and the testimony of the defendant, heretofore alleged, were material to the proceedings then being conducted by the Grand Jury, and the testimony of the said defendant, by reason of its falsity and known untruthfulness, so known to the defendant, did thereby impede and dissuade the Grand Jury in performing an expeditious inquiry."

Statute involved.

The indictment purports to be drawn under the provisions of Section 1621 of Title 18 U.S.C. the provisions of which have heretofore been quoted on page 2 hereof.

Other pleadings and motions.

Upon the return of the indictment, appropriate and timely pleadings and motions were filed by appellant. These were a motion for disclosure of matters occurring before the Grand Jury (R. 9), motion for bill of particulars (R. 10-12), motion to dismiss the indictment (R. 12-15) and petition and motion to suppress evidence (R. 19-21). These motions were supported by affidavits from appellant (R. 16-19 and R. 22-23).

The various motions were argued to the Court on July 22, 1953, and were, with one exception, denied. The order of denial read as follows:

"After hearing counsel, it is ordered that the motion to disclose the testimony of defendant before the Grand Jury be granted; the motion to dismiss for discovery, etc., for bill of particulars and to suppress evidence be and each of them is denied."

Thereupon, the defendant entered a plea of "Not Guilty." The trial commenced on July 19, 1954, and terminated with a verdict of guilty on Count One of the indictment on July 21, 1954. In the course of the trial and at the close of the evidence the Court below granted the motion of appellant's counsel for judgment of acquittal on Count 2 of the indictment and denied the said motion on Count 1 thereof. In the course of the trial and at the conclusion of the evidence presented by plaintiff the Court below granted the motion to strike the testimony of the witness, Jack Roland, and to strike Exhibit 14, but denied the motions to strike the testimony of the witnesses, Fred Whitted, Rosalyn Heller and Earl Madieros and the motions to strike Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15.

Following the verdict of guilty, appellant moved the Court below to set aside the verdict of the jury and enter judgment of acquittal and in the alternative that the verdict of guilty be set aside and a new trial ordered (R. 28-31). This motion and a motion in arrest of judgment (R. 31) were denied (R. 32).

The judgment and commitment of the Court below was entered on August 11, 1954 (R. 33) and notice of appeal was filed the same day (R. 35).

The evidence.

In order to inform this Court with definiteness of the precise nature of the evidence offered and received at the trial in the Court below, upon which is predicated the verdict of guilty, a detailed statement of the testimony of the witnesses will be made. This is done in order to show this Court the complete lack of corroborative evidence (whether properly admissible or not) from which the verdict of guilty could be sustained as a matter of law.

Testimony of the witnesses.

Charles St. John (R. 49-54) testified as follows:

He was foreman of the Grand Jury before which appellant testified under oath at a time when the allegedly perjurious testimony was given by appellant (R. 49-54). The testimony of this witness in no way corroborates the direct testimony of the government's principal witness, Irving Baskin, and will not, therefore, be set forth in detail.

Following the testimony of the witness St. John, the plaintiff read into evidence from page 3, line 5, to page 8, line 20, of Exhibit No. 1, the Transcript of the Grand Jury Proceedings of May 6, 1953 (R. 65-75).

Irving Baskin testified as follows (R. 77-99).

Direct: He had known appellant from about 1941 or 1942 (R. 77). He had known Tiny Heller, a betting commissioner, who died in January, 1952, for about 17 years (R. 78). He was employed by Tiny Heller in 1946 and 1947 on a part-time basis and most of the work was done

during the lunch hour. He took care of Mr. Heller's records for his legitimate business and also did his banking for him (R. 79, 80). The betting commissioner's office was in the back of the liquor store (R. 80). He was present in Mr. Heller's office practically every day. His accounting activities for Mr. Heller consisted of keeping records for the bar, the liquor store and the hotel. He prepared Mr. Heller's tax returns (R. 81). He had occasion to examine the betting commission records. He is familiar with the type of work that Mr. Heller kept in his betting commission business. He saw Exhibit No. 2 before. It is a running account of the bets that were made during the day and he saw Mr. Heller make entries in it (R. 82). He recognizes the handwriting in Exhibit No. 3 as that of Mr. Heller and he has seen Mr. Heller with books of that type (R. 84). He had seen Mr. Heller write checks in the book constituting Exhibit No. 4 and the handwriting therein is that of Mr. Heller (R. 84). The handwriting in Exhibit No. 5 is that of Mr. Heller and he had seen Mr. Heller write checks in that book (R. 85). The three checks exhibited to him and marked Exhibits No. 6, 7 and 8 are in the handwriting of Mr. Heller (R. 86). Two blue sheets marked Exhibit No. 9 are in the handwriting of Mr. Heller (R. 87). He went to the bank for Mr. Heller practically every day during the lunch hour. This banking was done at the Bank of America on 12th and Broadway (R. 87). Mr. Heller's operations ceased at the very end of 1947. He saw the defendant, James Arena at Heller's place of business. During the end he saw Mr. Arena there quite frequently, three or four times a week (R. 88). He saw Mr. Arena there during the lunch

hour. He had dealings with Mr. Arena for Mr. Heller a couple—or a few times. Sometimes Mr. Heller would tell him to go to Mr. Arena's liquor store and give him an envelope and he would take the envelope to Mr. Arena. These envelopes were sealed. That occurred about two or three times during the summer of 1947 (R. 89). He had occasion to cash checks for Mr. Heller. The cashing of checks for Mr. Heller occurred quite regularly. Mr. Heller carried large sums of money with him. The checks he cashed for Mr. Heller could be payable to him or could be his own checks (R. 90). Early in December, 1947, he had a transaction concerning a large sum of money in connection with the defendant Arena. On the day this transaction occurred he first saw Mr. Arena in the liquor store and present were Mr. Arena, Mr. Heller and the boy Stanley Duarte. Stanley Duarte is no longer living. There was a conversation between him and Mr. Heller in Mr. Arena's presence. Mr. Heller said to him, "Take these checks," a group of checks, "get them cashed into one thousand dollar bills and then give them to Jimmy" (R. 91). Prior to this statement Mr. Heller had these checks in his hand and he added them up on a piece of paper, wrote down the amounts, and then wrote his own personal check for the balance and handed the witness those checks and told him to cash them. The total amount of the checks was exactly $38,000.00; the conversation and the handing of the checks to the witness was in the presence of Mr. Arena (R. 92). Immediately after that the following occurred:

> "A. Well, Jimmie and I both left Tiny Heller's Liquor store, went to the Bank of America, just about two blocks away from there.

Q. When you say Jimmy, sir, you mean——

A. Mr. Arena.

Q. Mr. Arena.

A. And then we went to the tellers at the very far end of the bank, because that was the only teller that would handle bills of that denomination.

Q. Now, do you know the name of that teller, sir?

A. It was Herman Worth.

Q. Now, the bank that you went to was what bank?

A. Bank of America, 12th and Broadway, main branch.

* * * * * * *

Q. You went into the bank and you say you went to the window of Mr. Worth? A. That is right.

Q. Mr. Arena with you?

A. He was with me, but he stayed on the side.

Q. Was he within a distance where he could overhear what you were saying? A. He could have.

Q. But you don't know whether he did or not, he wasn't close? A. No, sir.

Q. So that he must have overheard? A. No, sir.

Q. What did you do with the checks at that time?

A. I gave them to Mr. Worth. Mr. Worth took them to the Chief Clerk to get them okayed.

Q. Do you know the name of the Chief Clerk?

A. Well, the fellow who okayed it was, his name was Madeiras.

Q. Madeiras? A. Yes, sir.

Q. What occurred after that, what did Mr. Worth do?

A. Mr. Worth came back to his cage and he got all the thousand dollar bills he had, there wasn't enough bills, so he asked Mr. Seale for his thousand dollar bills. Between the both they scraped up 38 one thousand dollar bills.

Q. What occurred after that?

A. I told Mr. Worth I didn't want him to hand money through the window,——

Mr. Zirpoli. I am sorry.

A. (continuing). ——I told Mr. Worth I did not want them to hand the money through the window because it was such a large sum, that I would meet him back of the Chief Clerk's office in the back of the bank to collect the money.

Mr. Zirpoli. It would be hearsay in the absence of——

The Court. Was James Arena in your company at that time?

The Witness. He was with me in the bank, yes, sir, on the side.

The Court. How close was he to you when this conversation went on?

The Witness. A. I imagine six to eight feet.

Mr. Schnacke. Q. He wasn't part of the group?

A. No, sir, he wasn't at the window.

Mr. Schnacke. I will stipulate it may be stricken.

The Witness. He wasn't at the——

The Court. The answer may go out, ladies and gentlemen of the jury, and you are instructed to disregard it.

Mr. Schnacke. Q. And what did you and Mr. Arena and Mr. Worth do thereafter?

A. We went to the back of the bank.

Q. And is that to a place in the public part of the bank or——

A. It is in the public part of the bank. There is a large, like a desk where they could transact business.

Q. Was it behind the counter?

A. Yes, that is the word I was trying to think of.

Q. You went inside through the counter——

A. We both stayed on the other side.

Q. I see, Mr. Worth was behind——

A. Mr. Worth was behind the counter.

Q. I see. What occurred at that counter?

A. I told Mr. Worth to count the money out in stacks of ten, with eight being the last one. I wanted to make sure all the money was there. And Mr. Worth counted the money out in stacks, three stacks of ten each and one of eight. Then I called Mr. Arena over and I counted the money over to him. He took the money, put it in his pocket.

Q. Do you know what pocket he put it in?

A. I don't recall.

Q. What did you do then?

A. We both walked out of the bank and we walked towards 14th and Broadway." (T. 93-96.)

He left Mr. Arena at the corner of 14th and Broadway around 12:30.

Cross-Examination: It was between 12:00 and 1:00 that he went to the bank. He was not the custodian of Mr. Heller's books. He never wrote the checks constituting the government's exhibits. He did not prepare Government's Exhibit No. 2 and had nothing to do with its preparation (R. 97). He did not prepare Government's ment's Exhibit No. 3 and had nothing to do with those papers. He had not written any of the exhibits shown to him. He physically turned over Government's Exhibit No. 2 to the Internal Revenue when it asked for Mr. Heller's records. All of Mr. Heller's records were put in a box to be turned over (R. 98).

Redirect Examination: He went from 12th and Broadway toward 14th and Broadway because he was going

down to Jimmy Murray's liquor store, where he stopped off sometimes before he went back to work (R. 99).

F. W. Whitted testified as follows (R. 99-132):

Direct: He was employed by Tiny Heller from 1941 to October, 1947, for the purpose of "making the prices" on baseball games during the Coast League baseball season. He had no association or connection with Heller after October of 1947. He saw Mr. Arena in Heller's place most every day, five or six times a week (R. 102). Mr. Arena placed bets with Mr. Heller, starting in 1941, in small amounts, twenty, thirty, forty, fifty dollars (R. 105). In 1946 and 1947 the bets ran larger, $100 to two or three thousand, sometimes on single events, sometimes in groups. Mr. Arena placed a thousand, two thousand on several single events (R. 106). He recorded transactions on behalf of Mr. Heller. When he recorded bets from Mr. Arena he wrote it on football parlays. Government's Exhibit No. 10 bears his handwriting and reflects bets placed by Mr. Arena in October, 1947. The initials "J.A." appearing on these exhibits were used by him to refer to James Arena (R. 109). These cards constituting Exhibit No. 10 were admitted for the purpose of showing size and character of these bets at that particular time and for no other purpose. The witness then explained the system of parlay betting as reflected by Exhibit No. 10 and the amounts won or lost on five bets recorded therein (R. 109-111). The initials "J.A." on Exhibit No. 9 and the figures reflecting the amounts won or lost on bets recorded therein were written by him. The other writing contained in Exhibit No. 9 is Mr.

Heller's writing (R. 114). He cannot tell from the exhibits and he does not know when the handwriting on Exhibit No. 9 was placed there (R. 115). These exhibits were offered only to show the fact that the characterization of Mr. Arena in the records was sometimes "J.A." and sometimes "Jimmy A." Mr. Heller's handwriting appears in Exhibit No. 2. He saw Mr. Heller make entries in it. He saw Mr. Heller work in books like Exhibit No. 3, the handwriting is that of Mr. Heller and this exhibit reflects single bets on different games (R. 119, 120). He recorded bets in the name of Arthur Samish. At one time Mr. Samish placed bets himself and at a later time Mr. Arena placed bets for Arthur Samish (R. 120, 121). When these bets were placed earlier there was a designation "AS" for the bettor and later there was a designation "SA". In 1941 and 1942 Mr. Samish placed the bets himself and the later period he referred to was 1946, '46 and '47 (R. 122). He had been present when he heard appellant place telephone calls from Mr. Heller's betting establishment. He had heard appellant ask for "the Colonel" on many occasions (R. 124). He knows Arthur Samish to be a person using the designation of "the Colonel" (R. 124).

The Court in permitting this testimony, said:

> "This testimony which is now being admitted, ladies and gentlemen, is not contained in the language of the indictment. It is merely admitted, and you are allowed to consider it for the purpose of showing any motivation or any purpose that Mr. Arena may have had, and in aiding you in subsequently determining whether or not he has perjured himself.

These are merely circumstances which you may take into consideration. He is not charged with these specific things which are now being admitted in evidence against him." (R. 124.)

Exhibit No. 10 reflects a winning of $7900.00. In the earlier years he made payments to Mr. Samish on the amounts he won. In the years 1945 and thereafter he made no settlements with Mr. Samish. The settlements were made to Mr. Arena (R. 125). Sometimes he was present when such settlements were made. These settlements were made in Mr. Heller's office in cash (R. 125, 126). He was acquainted with Mr. Baskin and then speaking of Mr. Baskin he testified:

"Q. And did he ever participate, as far as you know, in any settlement?

A. Well, he used to go and get the cash at the bank, is all.

Q. And did he ever deliver any cash so far as you know?

A. Delivered it to Tiny, he delivered it to Mr. Heller's office." (R. 126.)

Cross-Examination: A small bettor using the cards as contained in Exhibit No. 10 usually circled the teams that he is betting on and puts his name on the bottom of the card. This is not the usual practice for big bettors (R. 127). Everything on the card is in the witness' handwriting (R. 127). He personally paid appellant money on one occasion only. He can't remember the date. The amount was several hundred dollars. He doesn't remember exactly. It wasn't as much as $1,000.00 (R. 128). He saw payments being made to appellant most

every Monday at Heller's office. He cannot recall the amounts (R. 129). He can't say whether he had ever seen Exhibit No. 3 before (R. 129). He made none of the entries contained in Exhibit No. 2. He has no recollection of the conversations at the time the bets reflected in Exhibit No. 10 were made. He does not consider the bets reflected by this last exhibit as being heavy. The bet reflected in this exhibit was being made by Arena on behalf of Mr. Samish and was carried under "J.A." (R. 131).

Redirect: He observed, on many occasions, payments being made to appellant in amounts of "several thousand dollars, six, seven thousand, ten thousand; big amounts." Settlements were customarily made on Monday or Tuesday (R. 131).

Recross: He never handled the cash. He saw Mr. Heller giving cash to Mr. Arena, that is all. He can't pick out any specific dates or specific amounts. There were too many people coming in and going out (R. 132).

Rosalind Heller testified as follows (R. 132-157):

Direct: She is the widow of Zola Heller, usually known as Tiny Heller, who died January 23, 1952. During 1946, '46 and '47 she was living with Mr. Heller. In 1946 and 1947 Mr. Heller operated as a betting commissioner with his office in the rear of the liquor store. He also conducted his betting activities at home (R. 133). She recorded bets for him on occasions. She knows what kind of records he kept and she knows his handwriting. Exhibit No. 2 is his book. She observed him making entries in that book (R. 134) on many occasions. That book is a

record of his accounts. Exhibit No. 3 is a record of a type maintained by Mr. Heller (R. 135). She has seen him prepare records of that sort. It is in Mr. Heller's handwriting (R. 135). In admitting Exhibit No. 3 in evidence the Court said,

> "It will be admitted for the limited purpose of being an exemplar of certain business records kept by Mr. Heller, and having been further identified for that purpose only." (R. 136.)

Exhibits 4 and 5 are business records of Mr. Heller. These were admitted in evidence subject to the same limitation quoted above (R. 134). Exhibits 6, 7 and 8 are in Mr. Heller's handwriting. On occasion she recorded bets for Mr. Heller. She recorded a bet placed by James Arena (R. 139). She did not record them in Mr. Heller's book. She noted them on a separate piece of paper if it was necessary (R. 139). She only wrote one bet for Mr. Arena. She never used symbols to designate the bettor. She did not have to. She only did it occasionally, when Mr. Heller was ill or something. The initials "S.A." were used for "Artie Samish". Referring to check stub 1264 the "S.A." means "Artie Samish Account to James Arena" (R. 142). It is in her husband's handwriting and the check was for the amount of $6,150. Exhibit No. 3 says it's for the "week ending 11/30/47". The first three pages of that document represent wagers for Samish. It reflects that he won $34,800 (R. 143). An objection was interposed as to all of this testimony as hearsay. Check No. 1670 dated December 3, 1947, under "remarks", where it says "S.A." and the "A.C.T." means "Artie Samish

Account'' and the amount of the check is $6,050 (R. 143). The figure $38,400 shown on the third page of Exhibit No. 3 is a summary of all preceding pages (R. 146). Exhibit No. 2-1 contains a group of entries made on October 26, 1946. There are three bets involved in the ''S.A.'' bet. The entries reflect a win of $4,050.00 (R. 149). Exhibit No. 2-2 reflects seven bets. The initials ''S.A.'' refer to Arthur Samish. It reflects a win of $6,150. The names of the teams contained in Exhibit No. 2 for the period October, 1946,—Cards, Buffalo, Yanks, Forty-Niners, Boston, Phillies and Yanks were Eastern baseball (R. 152). Forty-Niners is a football game and Phillies was a baseball game. Yank was baseball (R. 152). Mr. Arena was frequently at her home and he transacted business with her husband there. In connection with that business Mr. Arena made telephone calls. When Mr. Arena picked up the receiver he would give a number. He would ask for Mr. Samish. That happened several times (R. 154).

Cross-Examination: She did not personally keep the account book, Exhibit No. 2. She did not personally make any of the entries (R. 155) in this book. She does not know whether she personally handled any of the transactions reflected by Exhibit No. 2-2. She does not know what the initials ''L.L.'' are. It is the name of a bettor, she does not know whose (R. 155). She does not know the initials ''P.N.'' She knows what the name ''Omaha'' means. She does not know what the name ''J.J.'' represents. She wasn't familiar with all of Mr. Heller's accounts. She did not personally prepare any part of Ex-

hibit No. 3. She did not personally participate in any part of the transactions represented there (R. 156). She personally had nothing to do with Exhibits No. 4 and 7, nor with the check stubs marked 1253 and 1264. She did not personally have anything to do with Exhibit No. 5 nor with the check stub marked 1670 (R. 157). She personally did not have anything to do with the payment or settlement or transaction covered by Check No. 1670 (R. 157).

Earl Madeiros testified as follows (R. 158-159):

Direct: He is employed by the Bank of America, Twelfth and Broadway Branch. In December, 1947, he was an Assistant Chief Clerk. He has an independent recollection of a transaction involving some $38,000 and a man by the name of Tiny Heller which occurred in December, 1947 (R. 158). The transaction, as he recalls it, was as follows:

> "Q. And would you tell us what your recollection is of that transaction?
>
> A. Well, to—it is my recollection that in December of 1947, which was possibly two months after I had gone under this new job, we were presented with a check totalling $38,000 by our paying teller. He wanted those to be approved for cashing. I had been on the job, as I say, approximately two months and wasn't entirely familiar with all the procedures on Tiny Heller's operation, so I referred them to the senior officers at the bank at the time and he gave me the nod that the checks were in order, so therefore I in turn approved them and handed them back to the paying teller to disburse the money." (R. 159)

He indicated his approval by his initials. There were four checks involved. The paying teller was Herman Wirth. He has seen the photostats of the four checks shown him before. These are Recordak copies. He has the film from which they were made. The film represents December 4, 1947. These checks appear on the film one right after the other. These checks contain his signature. The total amount of these checks is $38,000. They are the checks that were presented to him for approval. The checks were received in evidence as Exhibit No. 11 (R. 161). The rubber stamp on the face of the checks bearing the number 111 show that cash was paid for the checks. The stamp 10-C on each of these checks refers to the teller Herman Wirth (R. 162). The teller maintains a daily record of the amount paid out on all cash checks; the listing for the teller Mr. Wirth for the date of December 3, 1947 is still in existence. He produced it. It bears the stamp 10-C. The stamp indicates it was Mr. Wirth's (R. 162). The checks are reflected in the listing, being the first four checks in the lefthand column. They total $38,000. The pencil writing at the lefthand column appears to be that of Mr. Wirth. The name Madeiros, as an officer's name, appears opposite the amount of the check. This listing is called a teller's pay proof. It was introduced in evidence as Exhibit No. 12. Exhibit No. 8 in the amount of $6,050 bears his initials in the upper lefthand corner. That is one of the checks received on this occasion. The endorsement appearing on the reverse side of this check is that of Irving Baskin. He is familiar with the signature of Irving Baskin (R. 164).

Cross Examination: Among the duties and responsibilities of the Assistant Chief Clerk is the approval of drafts for payment. These four checks were presented for his approval and payment and in conformity with the practice which is followed for the approval of checks for payment, he wrote his name and initials on the face of the checks, after conferring with another officer; then he testified as follows:

> "Q. And the only knowledge that you have of this transaction is the fact that Mr. Wirth presented these checks to you and that you conferred with the senior officer and you approved the payment of the checks, isn't that correct? A. That is right.
>
> Q. And that is the only recollections you have of the entire transaction, isn't that correct?
>
> A. That's right." (R. 166)

Thereafter the prosecution read into evidence page 18, lines 6 to 24 and page 19, lines 6 to 11 from the transcript of the testimony of Mr. Arena before the Grand Jury (R. 168-169). This testimony related to purported bets made by appellant with Mr. Whitted in 1946 and had no relation to the transaction in December of 1947, upon which the indictment was predicated. Excerpts from the testimony of Mr. Arena before the Grand Jury were received in evidence and marked Exhibit No. 15 (R. 171).

Other evidence was offered with relation to the second count of the indictment; however, a judgment of acquittal was granted as to this count and there is, therefore, no need to summarize this evidence.

Thereafter the prosecution rested its case.

Appellant did not take the witness stand and no evidence was offered in his behalf.

Thereafter the defense rested (R. 179).

Following arguments of counsel, the Court below instructed the jury (R. 222-237) and it returned a verdict of guilty (R. 28). The instructions to which appellant takes exception will be separately discussed hereinafter. The judgment and sentence of the Court has hereinbefore been stated.

SPECIFICATIONS OF ERROR.

1. *The Court Below Erred in Denying Appellant's Motion to Dismiss the First Count of the Indictment.*
   Points on Appeal I, II, III, V, VI (R. 243-244).

2. *The Court Below Erred in Denying Appellant's Motions for Judgment of Acquittal on the First Count of the Indictment.*
   Points on Appeal VII, VIII, IX, X, XI, XII (R. 244-245).

3. *The Evidence Was Insufficient as a Matter of Law to Sustain the Verdict of the Jury.*
   Points on Appeal X, XI, XII (R. 244-245).

4. *The testimony of the Witness Irving Baskin Was Without Independent Corroborative Evidence and Therefore Insufficient as a Matter of Law to Sustain the Verdict of the Jury.*
   Point on Appeal XII (R. 245).

5. *The Court Below Erred in Admitting in Evidence the Testimony of the Witness F. W. Whitted Over Objection of Appellant.*
Points on Appeal XIII, XV (R. 246).

The full substance of the evidence complained of under this specification is that the witness Whitted was permitted to testify as to transactions and conversations with appellant completely unrelated in time or event to the transactions involved in the alleged perjurious statement of appellant and he was permitted to testify as to the meaning of transactions and entries in exhibits in which he did not participate and of which he had no personal knowledge. Repeated objections to this evidence were made by counsel for appellant (R. 101, 103, 104, 105, 106, 107, 108, 114, 115, 117, 118, 119, 120, 121) and a motion to strike the same (R. 171-172) was denied by the Court below (R. 176).

6. *The Court Below Erred in Admitting in Evidence the Testimony of the Witness Rosalind Heller Over Objection of Appellant.*
Points on Appeal XIV, XV (R. 245).

The full substance of the evidence complained of under this specification is that the witness Rosalind Heller was permitted to testify as to transactions and conversations with appellant completely unrelated in time or event to the transaction involved in the alleged perjurious statement of appellant and she was permitted to testify as to the meaning of transactions and entries in exhibits in which she did not participate and of which she had no

personal knowledge. Repeated objections to this evidence were made by counsel for appellant (R. 136, 137, 138, 140, 141, 142, 143, 145, 146, 148, 149, 150, 152, 153) and a motion to strike the same (R. 172) was denied by the Court below (R. 176).

7. *The Court Below Erred in Admitting in Evidence Each of the Following Government Exhibits: Nos. 2, 3, 4, 6, 7, 9, 10, 15.*
Points on Appeal XVI, XVII (R. 245).

These exhibits, individually and collectively, are completely unrelated in time or event to the transaction involved in the alleged perjurious statement of appellant and were admitted in evidence subject to limitations which were thereafter not adhered to by either the prosecutor in his argument or by the Court below in its instructions to the jury. Proper objections were made as to each of these exhibits (R. 108 (referring to previous objections, R. 106 and 107), 115, 117, 135, 136, 137, 138) and a motion to strike each of the same (R. 172, 173) was denied by the Court below (R. 176).

8. *The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 8 in Its Entirety and as Presented.*
Point on Appeal XXI (R. 246).

The requested instruction which the Court below refused to give in its entirety read as follows:

> "In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath, and circumstantial

evidence of such falsity, no matter how persuasive, is insufficient." (R. 44)

This requested instruction was submitted as a correct statement of the applicable law. Exception on this ground was taken to the failure of the Court to give this instruction (R. 232).

9. *The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 10.*
Point on Appeal XXII (R. 246).

"To sustain a conviction of perjury on either count of the indictment, the evidence as to such count must be strong, clear, convincing and direct. Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former and inconsistent with the innocence of the defendant. When I speak of corroborative evidence I mean evidence which tends to show the perjury independently." (R. 44, 45)

This was a proper and indispensable instruction since the sufficiency of the evidence to sustain a verdict of guilty of perjury on the testimony of a single direct witness requires corroboration thereof by other evidence which tends to show the perjury independently.

10. *The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 11.*
Point on Appeal XXIII (R. 246).

"Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead

directly to the inevitable—not merely probable—conclusion of falsity. The corroborative evidence must directly substantiate the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement and must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof." (R. 45)

This was a proper and indispensable instruction since evidence which merely establishes a probable conclusion of falsity will not sustain a verdict of guilty of perjury.

Exception to the failure to give this instruction was taken and authority in support of appellant's request was cited (R. 233).

11. The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 12.

Point on Appeal XXIV (R. 246).

"I have heretofore received in evidence acts and declarations and exhibits relating to transactions of the defendant other than those covered by the statements alleged in the indictment to have been made under oath by the defendant, and at that time I instructed you that such evidence was received for the sole purpose of throwing light upon the intent or motive of the defendant or to show prior design or plan of the defendant, and not for the purpose of showing the falsity of the specific statements attributed to him in the two counts of the indictment. Nothing I said during the trial and nothing I state in these instructions is to be construed by you to permit the consideration of such evidence for any other purpose." (R. 45, 46)

Much of the evidence was unrelated in time or event to the transaction involved in the perjury charge against the accused. He was, therefore, entitled to have the foregoing instruction fully and correctly given to the jury.

12. *The Court Below Erred in Giving the Following Instruction to the Jury.*
Point on Appeal XXV (R. 247).

> "By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy."

This instruction created the erroneous impression in the minds of the jurors that *any* corroboration of the testimony of the direct witness, such as a bank record, would suffice without clearly indicating that such corroboration must be of the falsity of the alleged perjurious statement of the accused. It permits a conviction on corroboration of collateral matters testified to by the direct witness.

Exception to the instruction on the foregoing grounds was taken (R. 233, 234).

ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE FIRST COUNT OF THE INDICTMENT.

The first count of the indictment charges two or more offenses in one count.

It is fundamental that two separate offenses may not be included in one count of an indictment.

Federal Rules of Criminal Procedure, Rule 8 (a);
United States v. Martinez-Gonzales, D.C. Cal., 1950, 89 F.S. 62;
United States v. Dembowski, D.C. Mich., 1918, 252 F. 894, 897.

The test in determining whether more than one offense is charged in an indictment (or count thereof) is whether or not each offense requires proof of some fact which the others do not.

Dimenza v. Johnston, 9 Cir., 130 F. 2d 465, 466;
Carpenter v. Hudspeth, 10 Cir., 112 F. 2d 126, 127.

It must be kept in mind that at the time of appellant's appearance before the Grand Jury, it was interested not only in the financial affairs of Arthur Samish and Frank X. Flynn, but also in the affairs and transactions of anyone who might have violated the income tax laws of the United States including appellant (R. 52).

A review of the allegations of the first count of the indictment which has been quoted in full at pages 4 to 6 hereof clearly shows that five separate offenses were charged in one count. They are:

One

Q. I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollar bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turn counted the $38,000 in these one thousand dollar bills to you and give you the bills. A. I didn't get them, sir.

Q. Did that happen? A. No, sir.

Q. Anything like it? A. No, sir.

Two

Q. Did you ever go there to the bank with this Baskins?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Three

Q. Has Mr. Baskin ever delivered any money to you? A. No, sir.

Q. Even one cent? A. Never had occasion to.

Four

Q. Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else? A. That's correct, Mr. Burke.

Five

Q. (By the Foreman) Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir. (R. 4-5)

Section 1621, Title 18 U.S.C., provides in part as follows:

> "Whoever, having taken an oath * * *, wilfully and contrary to such oath states * * * *any material matter* which he does not believe to be true, is guilty of perjury * * *" (Italics supplied).

Under this statute a witness commits the crime of perjury *each time* he states *any* material matter which he does not believe to be true. This principle was clearly stated in *United States v. Cason,* D.C. La., 39 F.S. 731, 734, wherein the Court said,

> "The defendant, as a witness before the Grand Jury, was bound to tell the truth, and each time he wilfully and corruptly swore falsely as to any distinct, separate and material matter under investigation, of which a Federal Court had jurisdiction, it constituted a separate offense of perjury."

We proceed then to examine the five separate matters set forth in the first count.

Proof of the falsity of number two above does not necessarily require proof of facts essential to the proof of the falsity of any one of one, three, four or five above.

Thus, if it were established that the defendant went to the bank with Mr. Baskin (two above) it would not necessarily prove that he received any money from Mr. Baskin (three above) and particularly it would not necessarily prove that he received 38 $1,000 bills from Mr. Baskin (one above) and, conversely, proof that appellant had received $38,000 from Mr. Baskin would in no way prove that appellant had gone to the bank with him. Similarly, proof of the falsity of No. Four above does not

necessarily require proof of facts essential to the proof of any one of One, Two, Three or Five above and proof of the falsity of Five above does not necessarily require proof of facts essential to the proof of any one of One, Two, Three or Four above.

Clearly, this indictment presents a situation wherein two or more offenses are alleged in one count. Each of the five matters of inquiry were material to the broad investigation then being conducted by the Grand Jury, yet each was directed to a distinct and separate matter within the knowledge of appellant.

The Circuit Court of Appeals for the Eighth Circuit, in *Seymour v. United States,* 77 Fed. 2d 577, dealt with the reverse situation. In that case appellant was sworn and testified before a Senate Committee investigating campaign expenditures in connection with the election of a United States Senator. The answers given by appellant in the course of his testimony became the basis of eight counts of an indictment, each of which charged him with perjury. After conviction on five counts, appellant took an appeal in which he contended that but one crime was charged in the several counts and that all the questions and answers assigned as perjury should have been put into one count. The Court refuted this contention in the following language at page 181:

> "* * * Neither the circumstances that all referred to the *same general subject of inquiry* or that all were made *at the same hearing* prevents each from being a separate and distinct crime punishable as such. The commission of perjury as to one matter does not absolve the witness or afford him immunity as to all

other matters covered by his testimony at the same hearing. The obligation to testify truly and the penalty for false swearing is present as to every material answer given by him. While there is a sound discretion as to such matters in the trial court (Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208; Morris v. United States, 161 F. 672 (C.C.A. 8)), it would seem there would have been more ground for attacking the indictment as duplicitous had all of these matters been joined in one count than there is to attack the statement in separate counts." (Italics supplied.)

See also:

United States v. Orman, 3 Cir., 207 F.2d 148, 160;
United States v. Emspack, D.C., D.C., 95 F.S. 1012, 1016.

We, therefore, respectfully submit that the first count of the indictment is duplicitous and that the Court below should have granted the motion to dismiss this count of the indictment (R. 12-15). For the same reasons the Court below should have granted the motion in arrest of judgment (R. 31). Both motions were timely made and strenuously urged.

SPECIFICATIONS OF ERROR NOS. 2, 3, AND 4.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE FIRST COUNT OF THE INDICTMENT. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICT OF THE JURY. THE TESTIMONY OF THE WITNESS BASKIN WAS WITHOUT INDEPENDENT CORROBORATIVE EVIDENCE AND, THEREFORE, INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICT OF THE JURY.

These specifications of error relate to the sufficiency of the evidence to sustain the verdict of the jury and arise from the denial of each of:

(a) appellant's motion for judgment of acquittal at the close of the government's case in chief (R. 176);

(b) appellant's motion for judgment of acquittal at the close of the entire evidence (R. 179); and

(c) appellant's motion for judgment of acquittal notwithstanding the verdict of the jury (R. 32, 238).

The statement of the accused alleged to have been perjurous (assuming but one offense is alleged in the first count of the indictment) was summarized by the prosecution as follows:

> "The first count alleges in substance that the defendant falsely swore that he had not received $38,000 from Mr. Baskin at a bank in Oakland." (Government's Memorandum in Opposition to Motion to Dismiss the Indictment.)

That the foregoing constitutes the basis of the first count of the indictment was further indicated by the Court below when it limited the testimony of the witness Whitted by saying:

> "This testimony which is now being admitted, ladies and gentlemen, is not contained in the language of the indictment. It is merely admitted, and you are allowed to consider it for the purpose of showing any motivation or any purpose that Mr. Arena may have had, and in aiding you in subsequently determining whether or not he has perjured himself. These are merely circumstances which you may take into consideration. He is not charged with these specific things which are now being admitted in evidence against him." (R. 124.)

Any other position by the government now would destroy its contention that the first count of the indictment is not duplicitous.

In prosecutions for perjury, the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the defendant. *United States v. Neff,* 3 Cir., 212 F. 2d 297, 306.

The *only* direct evidence offered by the government to show the alleged falsity of appellant's statements, if believed, was the testimony of Irving Baskin that early in December, 1947, he went to a branch of the Bank of America in Oakland accompanied by appellant and there cashed four checks for which he received thirty-eight one thousand dollar bills from the teller, Herman Wirth, which he then and there counted out and turned over to appellant (R. 92-96 and quoted in pages 10 to 13 of this brief).

Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence,

the latter must be inconsistent with the innocence of the defendant, i.e., the independent evidence must be corroborative of the fact that the accused swore falsely. *United States v. Neff,* supra; *United States v. Palese,* 133 F. 2d 600, 603; *United States v. Seavey,* 180 F. 2d 837, 839. Therefore, it is this testimony emanating from Irving Baskin as to his delivery of $38,000 to appellant for which there must be independent corroborative evidence. Corroboration of collateral matters testified to by the witness can never suffice.

F. W. Whitted, assuming but not for a moment conceding that his testimony was properly admitted in evidence, testified as to the association between appellant and Tiny Heller from 1941 through October of 1947. The testimony of Irving Baskin is that the transaction here involved occurred in early December, 1947. Mr. Whitted had no knowledge of any transactions between appellant and Mr. Heller after October or early November, 1947. *HE HAD NO KNOWLEDGE OF WHAT OCCURRED IN DECEMBER OF 1947.* He further testified that he had observed settlements of the Samish bets being made with appellant at Mr. Heller's office and that such settlements were always made in cash. He further testified as follows:

> "Q. And you are acquainted with Mr. Baskin?
>
> A. Yes, sir.
>
> Q. And do you know what his activities were at Mr. Heller's establishment? A. He was the auditor.
>
> Q. And did he ever participate, as far as you know, in any settlement?
>
> A. We * * *, he used to go and get the cash at the bank, is all.

Q. And did he ever deliver any cash so far as you know?

A. Delivered it to Tiny, he delivered it to Mr. Heller's office." (R. 126.)

This testimony, rather than substantiating the direct testimony, contradicts the likelihood that Mr. Baskin participated in the settlement of Mr. Heller's accounts. There is not one word of the testimony coming from F. W. Whitted that is inconsistent with the innocence of appellant and corroborative of Irving Baskin's testimony that he delivered $38,000 in cash to appellant at the bank in Oakland. Furthermore, F. W. Whitted was not employed by Tiny Heller in December, 1947, and did not and could not testify as to any transactions concerning Heller's betting commissions at that time. His testimony alone could not possibly corroborate the witness Baskin, nor could this testimony correlated with other evidence do so.

In considering Rosalind Heller's testimony, we will momentarily assume, but not for a moment concede, that her testimony was properly admitted in evidence. Her testimony was to the effect that bets were made for Arthur Samish and that for the week ending November 30, 1947, there was a net win of $34,800.00 on these bets as recorded in Exhibit No. 3. This latter testimony was purely hearsay, called for the opinion of the witness and was clearly inadmissible as will be made abundantly clear in the argument on Specification of Error No. 6. Mrs. Heller did not testify that appellant placed these bets. In fact, she had nothing to do with the transactions reflected in this exhibit, did not make the entries therein and had

no personal knowledge thereof. She did testify (over proper objection as hearsay) that Check Stub 1264, Exhibit No. 4, which bears the date October 30, *1946* and the initials "SA" means "Artie Samish Account to James Arena" (R. 142). Yet she had nothing to do with the preparation of that check (R. 156). Check No. 1264 had been endorsed "I. Baskin" and cash was paid for it by the bank according to the testimony of Earl Madeiros (R. 161, 162). Considered in the light most favorable to the government, this hearsay testimony of Mrs. Heller and the exhibits which bear upon it, tends to prove that Irving Baskin presented this check at the bank and that cash was paid for it and that it was, according to the check stub, for "Artie Samish Account to James Arena". Thus, there is absolutely no testimony from which we may infer that appellant accompanied Mr. Baskin to the Bank on December 3, *1947,* and there received $38,000 from him. Is not this evidence as consistent with the proven fact that Mr. Baskin delivered the cash to Mr. Heller's office as was his general practice?

Unfortunately, Mr. Heller was deceased at the time of the trial and thus the government and appellant alike were deprived of direct and positive evidence as to the circumstances attending the receipt and disbursement of the $38,000 cash received by Baskin on December 3, 1947. This circumstance does not militate against the well-established rule that the evidence must be strong, clear, convincing and direct, and that the corroborative evidence must tend to show the perjury independently. *United States v. Neff,* supra, 307.

The testimony of Earl Madeiros, Assistant Chief Clerk of the Twelfth and Broadway Branch of the Bank of America in December of 1947, when considered in the light most favorable to the prosecution will establish that on December 3, 1947, four checks totalling $38,000 drawn on the Zola Heller account were presented to him by a teller, Herman Worth, for approval for payment in cash, that he indicated his approval by placing his signature on the face of the checks (R. 159; Exhibit No. 11) and that cash was paid for these checks (R. 161, 162; Exhibit No. 12). One of these four checks in Exhibit No. 11, Check No. 1670, which is also Exhibit No. 8, bears the endorsement "I. Baskin". From this we might infer that Mr. Baskin presented the checks and received $38,000 in cash. This is merely corroboration of the receipt of money on the part of Baskin and is not corroboration of his direct testimony that he accompanied appellant to the bank and there turned over 38 one thousand dollar bills to appellant. Where is there any proof that appellant accompanied Irving Baskin to the bank? Where is there any proof that Irving Baskin paid $38,000 to appellant? Where is there any proof inconsistent with the fact that Irving Baskin did not deliver the $38,000 cash to Mr. Heller's office as was his usual practice? We respectfully submit that there is a complete absence of corroborative facts or circumstances arising from the testimony of Earl Madeiros or the exhibits which bear upon this testimony of Baskin.

The testimony of Earl Madeiros and the business records of the bank at which he was employed (Exhibits Nos.

11 and 12) were, undoubtedly, relied upon by the prosecution as the keystone of its case; yet, significant in this regard is the government's failure to call Herman Worth as a witness or to offer any testimony in explanation of such failure. It was Herman Worth, teller at the bank in Oakland, to whom the checks totalling $38,000 were presented by Irving Baskin. It was Herman Worth who presented the checks to Earl Madeiros, his superior, for approval in payment in cash. According to Irving Baskin it was Herman Worth who accompanied him and appellant behind the counter at the bank while the money was counted out first to Mr. Baskin and then to appellant. It was Herman Worth, if anyone, who could corroborate Mr. Baskin's testimony clearly and directly; yet, we repeat, he was not called as a witness nor was any reason or explanation given for the failure of the government to call him. For some unexplained reason the government failed to call still another employee of the bank, Mr. Seale, who participated in the cashing of the $38,000 (R. 94). It must be presumed, therefore, that had Herman Worth or Mr. Seale been called, their testimony would have been unfavorable, for as was said in *Ford v. United States,* 5 Cir., 210 F. 2d 313, 317,

> "The ruling even in criminal cases is that if a party has it peculiarly in his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

See also:

Billeci v. United States, 184 Fed. 2d 394, 398;

Dickinson v. United States, 9 Cir., 203 F. 2d 336, 344;

Matson Navigation Co. v. United Engineering Works, 9 Cir., 213 F. 293, 305.

No corroboration coming from the witnesses, we must now examine the exhibits admitted in evidence to see if they will independently corroborate Baskin's testimony that he went to the bank in Oakland accompanied by appellant and there obtained $38,000 in cash which he delivered to appellant. Exhibit No. 3 cannot be considered, for the Court, in admitting it into evidence, said,

> "The Court. It will be admitted for the limited purpose being an exemplar of certain business records which kept by Mr. Heller, and having been further identified for that purpose only." (R. 136.)

Since it is admitted as an exemplar only, its contents cannot be deemed evidence; however, assuming, without for a moment conceding, that its contents are evidence, we have what purports to be a weekly record of betting activities which was kept by Tiny Heller. It was described by the witness, Rosalind Heller (in violation of the hearsay evidence rule and over objection) as being for the week ending November 30, 1947 (R. 142). Over further objection of counsel for appellant the witness Rosalind Heller, was permitted to further interpret this exhibit. Giving this exhibit and testimony of Mrs. Heller interpreting the same every inference favorable to the prosecution, it may tend to prove that appellant placed bets ending the week of November 30, 1947, for the account of Mr. Samish which resulted in a net win of $34,800. This evidence does not

shed a spark of light upon the question most vital to the government's case. It does not constitute independent corroboration that Irving Baskin, early in December, 1947, went to a bank in Oakland accompanied by appellant where he obtained $38,000 in cash which he immediately turned over to appellant. This proof leads to the conjectural possibility that sometime after November 30, 1947, a settlement *might* have been made between persons unknown in an amount approximating $34,800, at a place unknown. There is nothing inconsistent with this proof and the fact that Mr. Baskin delivered the $38,000 to Mr. Heller as was his usual practice.

Exhibits 2, 2-1 and 2-2 must be considered in connection with Exhibits 4, 6 and 7. Exhibits 2-1 and 2-2, which record bets made by "S.A." during the month of October *1946,* reflect bets by this bettor resulting in net wins of $4,050 and $6,150. Stub No. 1253 in Exhibit 4 contains notations "W.B. S.A." and "$4,050.00 SAT." Exhibit 6 is Check No. 1253 dated October 28, *1946* in the amount of $11,950, and is endorsed by I. Baskin. Stub No. 1264 in Exhibit 4 contains notations "W.B., S.A. Act. to J.A." and "Amount $6,150.00." Exhibit 7 which is Check No. 1264 is payable to cash in the amount of $6,150, dated October 30, *1946,* and is endorsed by I. Baskin. These exhibits when considered in the light most favorable to the prosecution establish nothing more than that sometime near October 28, *1946* or October 30, *1946* bets were placed on behalf of someone known to Tiny Heller as "SA" which resulted in net wins of $4,050 and $6,150 and that $18,000 may have been

paid out by Tiny Heller, or someone in his behalf, to someone known to Tiny Heller as "J.A." in settlement of these wins plus another amount, the source of which is in no way indicated by the evidence herein. This transaction occurred in October, *1946*. It in no way corroborates Mr. Baskin's testimony that early in December, *1947* he accompanied appellant to the bank in Oakland and there obtained $38,000.00 which he turned over to appellant. It is inconceivable that proof of a transaction occurring in *1946* could be considered corroboration of a transaction which occurred in 1947 as testified to by the only direct witness, Irving Baskin.

Exhibits 5 and 8 must be considered together. Check Stub No. 1670 is dated December 3, 1947 and contains the remark "S.A. Act." Exhibit 8 is check No. 1670 dated December 3, 1947. The exhibit is silent as to how, by whom or to whom this amount was paid. Again this evidence in its most favorable light only proves that on or about December 3, 1947, Mr. Heller or someone on his behalf may have paid $6,050 to someone identified by the check stub as "S.A. Act." at some place. It has not one bit of corroborative value in regard to Mr. Baskin's testimony that early in December, 1947, he accompanied appellant to the bank and there turned over $38,000 to appellant.

Exhibit 9 contains the initials "JA" in Mr. Whitted's handwriting and was identified by him as referring to James Arena (R. 113, 114, 115). A net win of $2,000 is also reflected in Mr. Whitted's handwriting. On the opposite side of the exhibit appears a record of several

bets and the name "Jimmie A." all of which is in Mr. Heller's handwriting (R. 113). The date of this transaction is completely unknown, except that we do know it could not have been after October, 1947 (R. 100). It is in no way connected up with Mr. Baskin's testimony relating to the events of December 3, 1947, and, therefore, could not conceivably be corroborative of the testimony of Mr. Baskin. The most favorable construction that could possibly be given this exhibit is simply that sometime before October, 1947, appellant made a bet that resulted in a net win of $2,000.

Exhibit 10 is a group of five cards, described by Mr. Whitted as parlay cards (R. 108). Each card is dated October 26, *1946*. At the bottom of each card appears the initials "J.A." in the handwriting of Mr. Whitted and used to designate James Arena (R. 109). There is no evidence as to who received the proceeds of this transaction, by whom it was paid, how or where it was paid. Considered in the light most favorable to the prosecution, the most that this exhibit proves is that in October, *1946* appellant placed a series of bets with Mr. Whitted, who was acting on behalf of Tiny Heller, which bets resulted in a net win of $7,900. This transaction could have no conceivable relation to the transaction of December, *1947*, more than a year later, and, therefore, could not in any conceivable way corroborate the direct testimony of Mr. Baskin.

Exhibit 11 is a series of photostatic prints of checks. This exhibit must be considered in connection with Exhibit 12. The checks in Exhibit 11 represent a total of

$38,000. Three of the checks were payable to "T. Heller". There is no evidence as to who endorsed these checks for payment. The fourth photostatic copy is that of the check marked Exhibit 8, which is Check No. 1670. This check is payable to cash and is endorsed by "Zola Heller" and "I. Baskin". The cashing of these checks is reflected in Exhibit 12, which shows that the teller, Herman Worth, paid cash for these items, the amounts of which are listed in consecutive order on Exhibit 12. Check Stub No. 1670 in Exhibit 5 corresponds to the photostatic copy of the check in Exhibit 11, which is in the amount of $6,050.00. This stub bears the notation "S.A. Act.", which was in Mr. Heller's handwriting. The four checks in Exhibit 11 on their face all bear the notation "O.K. E. Madeiros", a rubber stamp marked "10-C", which refers to the teller Herman Worth, and a rubber stamp mark "111", which indicates that cash was paid on each of the four checks. These exhibits construed together at most lead to the inference that on December 3, 1947, they were exchanged for cash by Irving Baskin. They do not show or tend to show what Baskin did with the cash. The government will, undoubtedly, contend that these exhibits should be construed together with Exhibit 3, but Exhibit 3 was admitted in evidence merely as an exemplar of business records kept by Mr. Heller. Nevertheless, assuming Exhibit 3 was in evidence without limitation and for all purposes and construing it together with Exhibits 11 and 12 and 5 and 8 and giving it the most favorable interpretation possible for the government, the most that they prove is:

1. That for the week ending November 30, 1947, bets were placed by someone referred to in Mr. Heller's handwriting as "SA" which bets resulted in a net win of $34,800 (Exhibit 3).

2. That on December 3, 1947, four checks totalling $38,000 were presented by Mr. Baskin to Herman Worth, the teller, at the bank (Exhibits 11 and 12).

3. That Herman Worth presented the four checks to Mr. Madeiros for approval for payment (Exhibits 11 and 12).

4. That Mr. Madeiros indicated his approval of the checks for payment by the notation "OK E. Madeiros" on the face of the checks (Exhibit 11).

5. That Herman Worth, the teller at the bank, paid $38,000 in cash to Mr. Baskin on December 3, 1947 (Exhibit 11).

And that is as far as this proof could possibly go. It does not show what Mr. Baskin did with the cash.

Did he bring it back to the office of Mr. Heller, as was his practice? This is the only independent testimony in the record of what Mr. Baskin did with cash received when he went to the bank. Any other inference is pure speculation.

The vital testimony of Mr. Baskin was that early in December, 1947, accompanied by appellant, he went to the bank and there obtained $38,000 from the teller Wirth which he immediately counted out and turned over to appellant. It is this testimony which must be corroborated.

For a case clearly in point and in complete accord with the contention of appellant we again respectfully direct this Court's attention to *United States v. Neff*, supra, where at page 306 the Court said:

> "In prosecutions for perjury the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the defendant; the falsity must be evidenced by the testimony of two independent witnesses or by one witness and corroborating evidence, and in the absence of such proof the defendant must be acquitted. To sustain a conviction for perjury the evidence must be strong, clear, convincing and direct. Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, *the latter must be independent of the former and inconsistent with the innocence of the defendant.* 'When the courts speak of corroborative evidence they mean *evidence aliunde*—evidence which tends to show the perjury independently.' Before submitting a perjury case to the jury the court must determine whether the quantitative rule of evidence has been satisfied. Where corroborative evidence is offered the court must rule, as a matter of law, whether it is sufficient—that is, whether the corroborative evidence, if true, substantiates the testimony of the single witness who has sworn to the falsity of the alleged perjurious statement; the credibility of the corroborative testimony is exclusively for the jury.
>
> "Applying the principles stated, we are of the opinion that the trial judge erred in denying defendant's motion for acquittal as to Count 1. He should have ruled as a matter of law that the evidence asserted by the government to be 'corroborative' of

> Woolley's testimony as to the defendant's attendance at a Communist Party meeting patently failed to meet the standards of proof long established in perjury cases. The 'corroborative' evidence did not independently establish the perjury charged in Count 1. It did not establish or tend to establish that the defendant had ever attended a Communist Party meeting. The mere circumstances that one has signed a Communist Party nominating petition is in no way 'evidence' that one has attended a Communist Party meeting. Nor does the circumstance that one is a Communist Party member establish that he or she ever attended a Communist Party meeting. The same is equally true with respect to the collection of dues for the Communist Party." (Italics supplied.)

The case of *Radomsky v. United States,* 9 Cir. 180 Fed. 2d 781 at 783 also bears upon this question. There the Court said:

> "* * * Merely because the evidence is documentary does not dispense with the requirement that it be direct and positive. See Allen v. United States, 4 Cir., 194 F. 664, 667-668, 39 L.R.A., N.S. 385. In the federal cases in which documents have been used to establish perjury, the documents have, for practical purposes, *directly* established the falsity of the statement under oath." (Italics supplied.)

These principles have been affirmed repeatedly and must be considered the law controlling of this case. See also:

> *United States v. Rose,* 3 Cir., 215 Fed. 2d 617, 624, 625;

Miranda v. United States, 196 F. 2d 408, 411;
Weiler v. United States, 323 U.S. 606, 65 S. Ct. 548, 550;
Hammer v. United States, 271 U.S. 620, 46 S. Ct. 603;
McWhorter v. United States, 193 F. 2d 982, 983, 985.

Bearing these principles in mind in conjunction with the presumption in favor of appellant's innocence and the further presumption that had Herman Worth been called to testify by the prosecution, his testimony would have been unfavorable to the government, it is eminently clear that Irving Baskin's testimony that appellant accompanied him to the bank in Oakland where he delivered $38,000 in cash to appellant stands alone and uncorroborated. True, there is independent evidence to support his testimony that Baskin personally went to the bank and obtained $38,000 in cash on December 3, 1947. True, other evidence tends to prove that appellant placed bets with Tiny Heller over a period of years and that there was a net win of $34,800 in favor of the account of Mr. Samish in November of 1947; however, these incidents are not within the scope of Irving Baskin's direct testimony and are not corroborative of Baskin's testimony as to the *disposition* of this money. There is nothing in this collateral corroborative evidence which is inconsistent with the delivery of $38,000 in cash to Mr. Heller at his office or to Arthur Samish or to any other person.

The asserted corroborative evidence in the instant case is not direct or positive or inconsistent with the innocence of the accused. It does not "of itself" prove guilt.

We respectfully submit that there is a total absence of independent corroborating evidence in this case inconsistent with the innocence of appellant and that, therefore, the Court below erred in denying each of appellant's motions for judgment of acquittal.

SPECIFICATION OF ERROR NO. 5.

THE COURT BELOW ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF THE WITNESS F. W. WHITTED OVER OBJECTION OF APPELLANT.

The transaction involved in the alleged perjurious statement of the accused occurred on December 4, 1947. Of this transaction the witness, F. W. Whitted, had no knowledge whatsoever; nevertheless, he was permitted to testify at great length with relation to events, transactions and conversations which had occurred a year or more prior thereto. He was also permitted to testify as to the meaning of transactions and entries in exhibits in which he did not participate and of which he had no knowledge. The error arising in permitting such opinion and hearsay testimony is fully discussed in the argument on Specification of Error No. 6 pertaining to the testimony of the witness Rosalind Heller and will, therefore, not now be here discussed.

Repeated objections to the testimony of the witness Whitted were made by counsel for appellant (R. 101, 103, 104, 105, 106, 107, 108, 114, 115, 117, 118, 119, 120, 121) and a motion to strike the same (R. 171-172) was denied by the Court below (R. 176). Objections were interposed to Exhibit No. 10 which related to parlay bets made by

appellant with the witness in October of 1946 and to the testimony in explanation thereof on the ground that it was "incompetent, irrelevant and immaterial" (R. 106) and on the further ground that it was being admitted generally and that there was "no limitation being placed on the testimony as to its character or its purpose" (R. 107). The Court admitted Exhibit No. 10 in evidence and then instructed the jury as follows:

> "The Court. Yes. These cards which are being received in evidence, ladies and gentlemen, are admitted for the purpose of showing the size and character of those bets as of that particular time, and for no other purpose." (R. 108.)

Over objection of appellant, the Court admitted in evidence Exhibit No. 9. No foundation was laid for the introduction of this exhibit in evidence (R. 115) in that it was not shown when this record was prepared, where or how it was kept or that it was in any way intended as a permanent record of the business transactions of Mr. Heller (R. 116, 117).

With relation to Exhibit No. 2 the witness Whitted testified that he had seen Mr. Heller use it, not often, and that he usually used it at his home.

With relation to Exhibit No. 3, he testified that Mr. Heller used books of *that sort.* Then without further foundation and without any showing that Exhibit No. 3 was *in fact* a business record of Mr. Heller and without any showing that the witness had knowledge of this exhibit or the transactions reflected therein, over objection of appellant that his testimony was merely an opinion

and conclusion and hearsay (R. 119), he was permitted to testify as to the type of transactions recorded in this exhibit.

The vice in admitting the testimony of Mr. Whitted and Exhibits 9 and 10 lies in the fact that these exhibits and the testimony concerning the same had no relation whatsoever to the transaction of December 4, 1947, upon which the first count of the indictment was predicated. As a result, prejudicial injury came to appellant and the injury was aggravated by the failure of the Court to give appellant's requested instruction No. 12. All of this evidence, if admissible at all, was of necessity, limited in character and the jury should have been clearly so instructed before retiring to deliberate on its verdict.

SPECIFICATION OF ERROR NO. 6.

THE COURT BELOW ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF THE WITNESS ROSALIND HELLER OVER OBJECTION OF APPELLANT.

The Court below erred in permitting the witness, Rosalind Heller, to testify (over repeated objections of appellant) as to the meaning of entries contained in Exhibits 2, 3, 4, 5, 6, 7 and 8 and in denying appellant's motion to strike such testimony from the record.

She testified that she was the widow of Zola (Tiny) Heller who had operated a betting commission during the years 1946 and 1947; that Exhibits 2, 4, 5, 6, 7 and 8 were business records kept by Zola Heller in the course of his business as betting commissioner and that Exhibit 3

was of a *type* kept by Mr. Heller (R. 135-137); that she had never used symbols to indicate the name of a bettor in recording bets (R. 139). *The witness, Rosalind Heller, then testified as to the meaning of initials, figures, dates and symbols contained in these exhibits* (R. 140-152).

On cross-examinaiton she testified that she had not personally made any of the entries in Exhibits 2, 3, 4, 5, 6, 7 and 8 (R. 154-157) and that she had nothing to do with any of the transactions in which these exhibits were involved (R. 154-157).

Appellant interposed numerous objections to the direct testimony of Rosalind Heller on the grounds that it was hearsay or her opinion and conclusion (R. 140, 142, 143, 145, 146, 148, 149, 150, 152). To illustrate, these numerous objections were in part as follows:

> "Mr. Zirpoli. May it please the Court, I will object to that as calling for an opinion and conclusion of the witness and hearsay.
>
> The Court. You are familiar with those books, are you not?
>
> The Witness. Yes.
>
> The Court. You know what anything means that is therein contained, do you not?
>
> Mr. Zirpoli. I will submit it is hearsay. She must have been informed by someone else or it is an opinion." (R. 140)

> "Q. What does that mean?
>
> Mr. Zirpoli. Same objection your honor." (R. 140)

> "Q. And would you refer, Mrs. Heller, to the first three pages of that document?

Mr. Zirpoli. I object to all this testimony as hearsay, Your Honor, on the grounds previously stated." (R. 142)

"It is written here, 'plus $34,800'." (Remember she did not make this entry and had nothing to do with it.)

"Q. What does that mean? A. That he won that.

Q. That the bettor won, or Mr. Arena won?

A. The bettor won.

Mr. Zirpoli. I have an objection here as to hearsay as to all of this testimony.

The Court. The objection will be deemed to run to all of this testimony." (R. 143)

"Mr. Zirpoli. Well, I will object to that as calling for the opinion and conclusion of the witness, and hearsay. These entries were not made by the witness, and she is giving an explanation of entries made by someone else and giving an opinion from that." (R. 145)

"Mr. Zirpoli. Your Honor, there is no foundation laid. It is hearsay, and calls for an opinion and conclusion of a witness." (R. 148)

These objections, timely made, were overruled and the testimony was permitted on the theory that one who is familiar with business records is entitled to explain the meaning of those records (R. 145). A timely motion to strike this testimony (R. 172) was denied (R. 176).

A fundamental principle which governs the admissibility of testimony is that a witness may testify only as to those facts which he knows of his own knowledge, that is which are derived from his own perceptions unless, of

course, such testimony comes within one of the well-defined exceptions to the above-stated principle. *Fox v. Order of United Commercial Travelers,* 5 Cir., 1952, 192 F. 2d 844, 846.

This question was considered in *Southern Ry. Co. v. Mooresville Cotton Mills,* 4 Cir., 187 F. 72, 73, and the question was framed by the Court as follows:

> "In other words, did the witness testify as to facts that were within his own knowledge, or did his testimony depend upon information received from another?"

In discussing the question the Court said:

> "It should be borne in mind that the witness testified that he did not prepare the statement and that he was not present when the cars were weighed. Thus, we are informed by the witness that his testimony was not as to facts within his own knowledge, but that his information was derived from a statement made by another in regard to a transaction about which he had no knowledge whatsoever. * * * Evidence of this character is clearly incompetent."

Applying this principle to the testimony of Mrs. Heller we see that at most she was familiar with Exhibit 2, as a book kept by Mr. Heller in his handwriting, that Exhibit 3 was a record of a *type* (or sort) that Mr. Heller kept and that it is in his handwriting (R. 135), that Exhibits 4, 5, 6, 7 and 8 were business records of Mr. Heller kept in his handwriting. This is her complete and only knowledge as to these records.

On cross-examination as to these records she testified that she did not personally make the entries in and did not handle any of the transactions reflected in Exhibit 2 (R. 155, 156); that she did not personally prepare any part of and did not personally handle or participate in any part of the transaction reflected in Exhibit 3 (R. 156); that she did not personally prepare any part of and did not personally have anything to do with Exhibits 4, 5, 6, 7 or 8 or the transaction reflected therein (R. 156-157).

Thus it is apparent that Mrs. Heller did not have adequate knowledge of these books and records to make her a competent witness to testify as to the meaning of the entries therein.

We do not concede that her testimony was sufficient foundation to admit these exhibits in evidence under Section 1732, Title 28 U.S.C., and we most emphatically assert she was not competent to testify as to the meaning of the entries therein. The trial Court must have been of the same mind for in admitting Exhibit 3 (and 4 and 5) in evidence it did so for the "limited purpose of being an exemplar of certain business records" kept by Mr. Heller (R. 136).

But even if we were to concede that sufficient foundation was laid to admit the exhibits themselves in evidence it does not follow that the witness is thereafter rendered competent to testify as to the contents or meaning of the contents of such records. As was said by the Court in *United States v. Quick,* 3 Cir., 128 F. 2d 832, 838,

> "The statute was intended to render admissible in evidence books and records, made in the usual course

of business, without further authentication, but it was not intended to make book entries the touchstone by which incompetent oral testimony would become competent."

In *United States v. Compagnaro,* 63 F. Supp. 811, 815, the Court said:

"It should be noted that there is statutory authority for permitting the government to prove facts by offering in evidence a copy of the government records under the seal of the department. * * * However, even this statute does not permit the contents of government records to be proved by parol testimony as was here done. *Nock v. United States,* 2 Ct. Cl. 451."

See also:

Phillips & Benjamin Co. v. Ratner, 2 Cir., 207 F. 2d 372, 375, 376;

Rosenthal v. M'Graw, 4 Cir., 138 F. 721, 724;

Barnett v. Aetna Life Ins. Co., 3 Cir., 139 F. 2d 483, 485.

The argument of the prosecutor that business records always require some type of interpretation by some person familiar with them (R. 145) and the theory upon which Mrs. Heller was permitted to testify assumes the very facts in question. The rule propounded by the government does not obviate the necessity that the witness must testify as to facts which she knows of her own knowledge—the product of her own perception, as contrasted to her opinion or what may have been related to her by someone not before the Court.

As we said before, Mrs. Heller had nothing to do with the entries or the transactions therein reflected. She did not know whether they were true or accurate, she did not know when they were recorded, she did not supervise or control their entry or preparation in any way. These entries, such as "J.A.", "S.A.", "Jinnie A.", "A.C.T.", "Jimmie A", "to Cash", "W.B.", "off", or any such symbol or remark contained therein, were made by Mr. Heller and he *alone* participated in the events and transactions reflected therein. Mrs. Heller can speculate as to what these entries meant to Mr. Heller, she can guess as to what was intended by the entrant of these words, symbols and initials, she can even have personal knowledge of what was told to her by Mr. Heller as to the meaning of these records, but this does not render competent her testimony as to what actually was intended by Mr. Heller. She cannot testify of her own knowledge as to the true meaning of any of the entries contained in the exhibits.

To permit her to so testify is to permit hearsay upon hearsay or to give an opinion and conclusion upon hearsay. Such is not the law.

See:

Peightel v. United States, 8 Cir., 49 F. 2d 235, 237, 238;

D. P. Paul & Co. v. Mellon, 24 F. 2d 738, 740.

We, therefore, respectfully submit that the Court below erred in admitting her testimony over objections of appellant; that it erred in denying appellant's motion to strike this testimony; and that the rights of appellant were so prejudiced thereby as to require a reversal of the judgment of the Court below.

SPECIFICATION OF ERROR NO. 7.

THE COURT BELOW ERRED IN ADMITTING IN EVIDENCE EACH OF THE FOLLOWING GOVERNMENT EXHIBITS: NOS. 2, 3, 4, 6, 7, 9, 10 AND 15.

Each of these exhibits will be separately considered.

Exhibit No. 2: The only foundation for the admission of Exhibit No. 2 in evidence consists of the following:

a. The testimony of Irving Baskin that he had seen the book before, that the entries therein are in the handwriting of Mr. Heller, that it is a running account of bets that were made during the day and that he had seen Mr. Heller make entries in the book. He further testified that he was not the custodian of the books, that he did not prepare any of them but that at one time he had turned them over to the Internal Revenue at the request of Mr. Heller.

b. The testimony of F. W. Whitted that this exhibit was a volume used by Mr. Heller for monthly business, that he had seen him use it, not too often, that he usually used it at his home and that the handwriting in the book was that of Mr. Heller.

c. The testimony of Rosalind Heller that this book was in the handwriting of her husband, that she saw him make entries in it on many occasions and that it was a recording of his accounts.

An objection was made to the introduction of this exhibit in evidence on the ground that no foundation was laid therefor (R. 135).

We respectfully submit that the evidence to justify the admission of this exhibit in evidence was inadequate. We

recognize it is unnecessary to call as witnesses the parties who made entries kept in the regular course of business. None of the three witnesses who testified had anything to do with Exhibit No. 2 or the transactions reflected therein nor did they have any supervision or control over the keeping of the same. There is no showing of any character as to when the entries were made or any showing from which one might conclude that they were truly or accurately kept. Nor was there any showing that it was Mr. Heller's regular course of business to keep such records. Under the circumstances, the foundation laid was inadequate and Exhibit No. 2 should have been excluded from evidence and the motion to strike the same (R. 172-173) should have been granted.

Exhibit No. 3: While Exhibit No. 3 was admitted in evidence "for the limited purpose of being an exemplar of business records kept by Mr. Heller" (R. 136) nevertheless in the subsequent treatment of this exhibit both the Court and, particularly, the government in its closing argument treated this exhibit as though it were in evidence for all purposes (R. 188, 189) thereby unequivocally prejudicing appellant's case before the jury. No foundation was laid for the admission of this exhibit in evidence for such general purpose. There was no showing of any kind that it was in fact a business record of Mr. Heller kept in the usual course of his business and the only testimony on this score is the following:

Testimony of Irving Baskin:

"Mr. Schnacke. Q. Now, sir, I will show you another book that is in the form of something like a sales book. Have you ever seen that book before?

A. I have seen *books like this,* yes.

Q. And you recognize the handwriting in that book? A. Yes, sir.

Q. Whose handwriting is that? A. Mr. Heller's.

Q. Was that book *of a type* used by Mr. Heller as a business record? A. Yes, sir.

Q. Did he use sales books *of that sort?*

A. He would jot down the bets as they come over the telephone.

* * * * * * *

Mr. Schnacke. Q. You have seen him with *books of that type,* have you? A. Yes, sir.

Q. And you recognize that as his handwriting?

A. This is his handwriting.

Mr. Schnacke. I will ask that the book identified by the witness be marked Government's Exhibit next in order for identification.

The Court. So ordered." (R. 83)

Testimony of F. W. Whitted:

"Mr. Schnacke. Q. Have you ever seen him work on books like that, sir? A. Many times.

Q. And did he use books *of that sort* to reflect a certain type of transaction? A. Yes, sir.

Mr. Zirpoli. Object to that as calling for the opinion and conclusion of the witness, and hearsay as to what it would reflect.

The Court. If he knows, the answer may stand. Do you know that?

The Witness. Yes, sir.

Mr. Schnacke. Q. What type of transactions were recorded in books of that sort?

Mr. Zirpoli. Same objection, Your Honor.

The Court. Same ruling; overruled.

A. Single bets on different games.

Mr. Schnacke. Q. And that is a distinction between single bets and the type of parlay that you have been speaking of before, is that right? A. Yes, sir.

Q. And you recognize the handwriting on that?

A. Yes, sir.

Q. As whose? A. Tiny Heller's." (R. 119, 120)

Testimony of Rosalind Heller:

"Mr. Schnacke. Q. Mrs. Heller, I will show you Government's Exhibit No. 3 for identification. Are you acquainted with the handwriting that appears on that record? A. Yes.

Q. And is that *a record of a type* maintained by Mr. Heller? A. Yes.

Q. And have you ever seen him prepare records *of that sort?* A. Yes.

Q. I take it you do not recall whether or not you saw that particular record prepared or not, is that right? A. I saw most of this record.

Q. And you say that that is in Mr. Heller's handwriting? A. Yes.

Q. I notice inserted in that is an adding machine tape. Do you know how that tape would have come in there? A. Well, this is the figures.

Q. Is that the figure at the bottom?

A. I don't know who taped it off.

Q. But the writing at the bottom is? A. Yes.

Q. A total figure is there, is that right? A. Yes.

Q. And those figures on Page 74 and the language there is his, is that right? A. Yes.

Mr. Schnacke. I will ask that Government's Exhibit 3 for Identification be received in evidence.

Mr. Zirpoli. I will object to its receipt in evidence, if Your Honor please, on the ground no proper foundation has been laid therefor. There has been no

showing what it represents, any period of time, or any other connection.

The Court. It will be admitted for the limited purpose being an exemplar of certain business records which kept by Mr. Heller, and having been further identified for that purpose only.

Mr. Zirpoli. May I respectfully suggest that even the preceding records be received for such purpose only?

The Court. All right, I will admit those for the same purpose." (R. 135, 136)

Under the circumstances it is obvious that no foundation was laid for the admission of this exhibit in evidence and that it was prejudicial error to permit it to be thereafter considered and treated as though it were in evidence for all purposes. The motion to strike this exhibit from the record (R. 172, 173) should have been granted.

Exhibits Nos. 4 and 5: The same objection applies to Exhibits 4 and 5. The objection and ruling of the Court on these two exhibits was as follows:

"Mr. Zirpoli. Same objection, Your Honor; irrelevant and immaterial in that no showing is made as to their materiality, no foundation laid for their admission in evidence.

The Court. Objection overruled. They will be received subject to the same limitation, that I have heretofore described.

(Whereupon documents previously marked Government's Exhibits 4 and 5 for Identification were admitted into evidence.)" (R. 137)

Thereafter the prosecution was permitted to and did treat these exhibits and argued with relation to the same

(R. 191) as though they were admitted in evidence for all purposes. Again the appellant was unequivocally prejudiced thereby.

Exhibits Nos. 6, 7 and 8: Exhibits Nos. 6, 7 and 8 constitute three checks, one dated October 28, 1946 (Exhibit No. 6), another dated October 30, 1946 (Exhibit No. 7) and the third dated December 3, 1947 (Exhibit No. 8). The only foundation laid for the admission of these three checks in evidence was:

a. The testimony of Irving Baskin that these checks were in the handwriting of Tiny Heller (R. 86).

b. The testimony of Rosalind Heller that these checks are represented by check stubs in Exhibits Nos. 4 and 5 and that they are in the handwriting of Mr. Heller (R. 137).

The Court admitted these exhibits in evidence (R. 138) over objection of appellant that no foundation had been laid to justify their admission in evidence (R. 138). In admitting them in evidence the Court did so subject to motion to strike (R. 138). A subsequent motion to strike these exhibits (R. 172, 173) was denied.

It is respectfully submitted that certainly Exhibits 6 and 7 should not have been admitted in evidence and the motion to strike the same should have been granted. Exhibit No. 8, likewise, should have been stricken from the record although there was subsequent testimony to tie Exhibit No. 8 in with Exhibit No. 11.

Exhibits Nos. 9 and 10: Exhibits 9 and 10 admitted in evidence under the testimony of the witness F. W.

Whitted and heretofore discussed under Specification of Error No. 5 had no relation to the alleged perjurious statement of appellant and related to transactions occurring at least one year prior to December 4, 1947. Under the circumstances, these exhibits were not admissible in evidence for any purpose and should have been stricken on motion of appellant (R. 172, 173).

Exhibit No. 15: Exhibit No. 15 is an excerpt of the testimony of James Arena before the Grand Jury and relates to transactions had with the witness, F. W. Whitted, at least a year prior to the transaction involved in the alleged perjurious statement of appellant. The objection to the admission of this testimony in evidence was stated by counsel for appellant as follows:

> "Mr. Zirpoli. Yes, Your Honor. And, may it please the Court, with relation to the reading of the other portions of the transcript into the record, I shall at this time, I would like to interpose an objection to the reading thereof, Your Honor, on the ground that the remaining portions of the transcript to which he now makes reference are irrelevant and immaterial, that no foundation has been laid to justify its admission in evidence, and it is not in corroboration of the specific charges laid in the respective counts of the indictment; and on the further ground at most they constitute circumstantial evidence which I submit under the rulings of the Ninth Circuit would not be proper evidence of the falsity of the specific counts of the indictment.
>
> The Court. Overruled." (R. 168)

These objections were valid on all the grounds above quoted and the admission of this portion of the transcript

of the testimony of appellant before the Grand Jury, without limitation, unquestionably prejudiced appellant in the minds of the jurors. It pertained to a purely collateral matter that had no relationship to the falsity of the statement involved in the first count unless, of course, the government is prepared to concede that the first count alleges more than one offense in which event the indictment should have been dismissed.

SPECIFICATION OF ERROR NO. 8.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 8 IN ITS ENTIRETY AND AS PRESENTED.

This requested instruction which the Court below refused to give in its entirety read as follows:

> "In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath, and circumstantial evidence of such falsity, no matter how persuasive, is insufficient." (R. 44)

Exception was taken to the failure of the Court to give this instruction in its entirety. That exception was stated as follows:

> "Mr. Zirpoli. May it please the Court, at this time I respectfully object to the failure of the Court to give the defendant's requested instruction No. 8 to the effect that circumstantial evidence is insufficient. I cite the case of Radomsky vs. United States. I feel it has peculiar application to this case because of the circumstantial nature of much of the evidence.

The Court. The Ninth Circuit held that all evidence, whether circumstantial or direct, may be considered.

Mr. Zirpoli. Yes. I cite this case because it was a Ninth Circuit case." (R. 232)

The Court instructed the jury as follows:

"In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath. The falsity of the statement made under oath must be proved by clear and convincing evidence. The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidenced by the testimony of two independent witnesses, or by one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted." (R. 230)

It was the failure of the Court to add the language, "and circumstantial evidence of such falsity, no matter how persuasive, is insufficient" to which we excepted. This exception was well taken and the authority therefor is *Radomsky v. United States,* 9 Cir., 180 F. 2d 781, 782, wherein the Court said,

"The Court, in accordance with the general rule, instructed the jury that in order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement under oath, and that circumstantial evidence of such falsity, no matter how persuasive, was insufficient. This instruction was not objected to by the Government and the case was tried on that theory of the law. No contention is here made that such is not the law as applied

by the federal courts. Our problem, therefore, is to determine whether the evidence in this case is insufficient to meet the requirement in perjury cases."

SPECIFICATION OF ERROR NO. 9.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 10.

This requested instruction, which the Court below refused to give, reads as follows:

> "To sustain a conviction of perjury on either count of the indictment, the evidence as to such count must be strong, clear, convincing and direct. Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former and inconsistent with the innocence of the defendant. When I speak of corroborative evidence I mean evidence which tends to show the perjury independently." (R. 44, 45)

The instruction given by the Court below on this score (R. 230) was inadequate in that it failed to set forth the requirement that the corroborative evidence must not only be independent of the testimony of the single direct witness, but also *inconsistent with the innocence of the defendant.* The instruction given by the Court was erroneous for the further reasons herein discussed under Specification of Error No. 12. As authority for his position, appellant cited *United States v. Neff,* 3 Cir., 212 F. 2d 297, 306, 307 (R. 45) wherein the Court said:

> "* * * To sustain a conviction for perjury the evidence must be strong, clear, convincing and direct.

Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, *the latter must be independent of the former and inconsistent with the innocence of the defendant.*"

SPECIFICATION OF ERROR NO. 10.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 11.

This requested instruction which the Court below refused to give reads as follows:

> "Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead directly to the inevitable—not merely probable—conclusion of falsity. The corroborative evidence must directly substantiate the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement and must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof." (R. 45)

This was a proper and indispensable instruction since corroborating evidence in a perjury case which leads to a mere probable conclusion of falsity is not enough.

This requirement of the law was completely ignored by the Court below and it refused to correct its error in this respect when appellant directed the Court's attention thereto in his exceptions (R. 233). Appellant stated that such instruction was peculiarly adaptable to the evidence in this case and cited as his authority *United States v.*

Neff, supra, from which the requested instruction was taken verbatim (page 308 of 212 F. 2d).

Failure to give this instruction was clearly prejudicial and alone grounds for a reversal of the judgment of the Court below.

SPECIFICATION OF ERROR NO. 11.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 12.

This requested instruction which the Court below refused to give reads as follows:

> "I have heretofore received in evidence acts and declarations and exhibits relating to the transactions of the defendant other than those covered by the statements alleged in the indictment to have been made under oath by the defendant, and at that time I instructed you that such evidence was received for the sole purpose of throwing light upon the intent or motive of the defendant or to show prior design or plan of the defendant, and not for the purpose of showing the falsity of the specific statements attributed to him in the two counts of the indictment. Nothing I said during the trial and nothing I state in these instructions is to be construed by you to permit the consideration of such evidence for any other purpose." (R. 45, 46)

Much of the evidence coming from the witnesses, W. F. Whitted and Rosalind Heller, and, particularly, Exhibits 2, 4, 6, 7, 9, 10 and the transactions therein reflected, were completely unrelated in time or circumstance to the transaction involved in the perjury charge against the

accused. Appellant was, therefore, entitled to have the foregoing instruction fully and correctly given to the jury.

True, the Court below instructed the jury as follows:

> "Now, the Court permitted evidence from which you could find that the defendant made false statements to the Grand Jury other than the false statements contained in the indictment. Such evidence, if believed by you, is to be considered by you only insofar as you may find it bears upon or relates to the intent or willfulness of the defendant with respect to the false statements charged in the indictment.
>
> "You are not to consider the evidence of other false statements made by the defendant to the Grand Jury, if they are found to be false by you, unless you find beyond a reasonable doubt that the defendant made the statements charged in the indictment and that the falsity of those statements was proved in the manner which I have heretofore instructed you is required. It is not to be otherwise considered by you." (R. 230, 231.)

This was a vague, indirect and incomplete approach to the collateral evidence in this case, which, if not properly and clearly limited, would only tend to confuse the jurors and prejudice appellant in their minds. The requested instruction went to "acts and declarations and exhibits relating to transactions of the defendant other than those alleged in the indictment." The instructions of the Court as given did not go far enough and did not cover these additional and clearly collateral matters, which were not reflected in Mr. Arena's testimony before the Grand Jury.

SPECIFICATION OF ERROR NO. 12.

THE COURT BELOW ERRED IN GIVING THE FOLLOWING INSTRUCTION TO THE JURY.

"By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy."

The exception of appellant reads as follows:

"This is my objection thereto, may I respectfully submit to Your Honor, that the instruction as given leaves the impression that anything the witness who testified directly to—if anything she says is corroborated, that alone is enough.

"I submit that it is not the test, and the test is that the corroboration must be on the direct testimony which relates to the falsity of the very charge with which the defendant is accused; and that if the corroboration is to something that is not as to the actual falsity of the thing he is accused of, that is not adequate corroboration, and to that extent I submit the instruction is inadequate and erroneous." (R. 233-234.)

This exception was well taken.

In considering this question, the Court in *United States v. Neff*, supra, 306, 307, said:

"In prosecutions for perjury the uncorroborated oath of one witness is not enough to establish the *falsity* of the testimony of the defendant; the *falsity*

must be evidenced by the testimony of two independent witnesses or by one witness and corroborating evidence, and in the absence of such proof the defendant must be acquitted * * * Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former *and inconsistent with the innocence of the defendant.* 'When the courts speak of corroborative evidence they mean *evidence* aliunde —evidence which tends to show the perjury independently.' * * * Where corroborative evidence is offered the Court must rule, as a matter of law, whether it is sufficient—that is, whether the corroborative evidence, if true, substantiates the testimony of the single witness who has sworn to the *falsity* of the alleged perjurious statement." (Italics supplied.)

See also:

McWhorter v. United States, 5 Cir., 193 F. 982, 985;
United States v. Hiss, 2 Cir., 185 F. 2d 822, 824;
Fraser v. United States, 6 Cir., 145 F. 2d 145, 151;
United States v. Buckner, 2 Cir., 118 F. 2d 468;
United States v. Rose, 3 Cir., 215 F. 2d 617, 624-625.

The variance between the instructions as given on this point and the law as to what constitutes corroborative evidence is obvious, particularly when considered with regard to the purpose of the "two witness" rule. The instructions given *place emphasis upon corroboration of the testimony of the witness or evidence to substantiate his testimony.* Pursuant to this type of instruction a jury could properly find corroboration of the testimony of a single direct witness even though not one scintilla of corroborating evidence has been offered to prove the alleged *falsity* of the defendant's statement. It permits a con-

viction on corroboration of collateral matters testified to by the direct witness. Such is not the law.

The error was aggravated by the example given by the Court below when in its instruction it said, "such as a bank record or check or business record." This example more than anything appellant could say proves the error of the Court's instruction.

In this case, Exhibit No. 11 could very well corroborate Mr. Baskin's testimony as to the *receipt* of $38,000 in cash, but it is not corroboration of the *disposition* of the cash, turning over of $38,000 by Baskin to appellant. The falsity here involved is not the receipt of the $38,000, but the turning over of $38,000 in one thousand dollar bills to appellant; hence, the jury under the Court's erroneous instruction, could very well conclude that Baskin was corroborated by the bank records as to the receipt of the $38,000 and believing this was corroboration could find appellant guilty without ever appreciating that the fact requiring corroboration was the turning over of the money by Baskin to appellant.

A stronger case of prejudice could not be made out.

The cases cited by appellant are clear in stating that the corroborating evidence must prove the *falsity* of the testimony of the defendant independent of the testimony of the direct witness. These cases place emphasis upon *proof of the falsity of the* defendant's testimony.

The rule as applied by the cases cited by appellant takes into account the reason for the "two witness" rule and looks through the cloud cast upon it by the same but misnomered rule "of corroboration", that reason basically being to prevent convictions for perjury by an oath against

an oath. Were the law otherwise, a witness for the prosecution might very well testify truthfully as to matters collateral to the alleged perjurious statement and be in corroboration of such testimony, yet himself be guilty of giving false testimony in contradicting the statement of the defendant. We repeat the instruction as given by the Court below would allow conviction upon corroboration of the direct witness' testimony as to collateral matters without any corroborating evidence as to the falsity of the defendant's statement.

Assuming the propriety of the first part of the Court's instruction (that which preceded the objectionable instruction), the influence which the latter instruction had upon the minds of the jurors must not be underestimated for as was said in *Ballenback v. United States,* 326 U.S. 607, 66 S.Ct. 402, 405,

> "* * * 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed. 841, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

And later the Court said,

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

Certainly the trial Court's instructions as to corroboration were equivocal. That portion of the instruction which deals specifically with corroborative evidence is a glaring

misstatement of the law. When considered with regard to the general instruction immediately preceding it and the great emphasis placed upon the necessity for corroborative evidence by respective counsel in their arguments to the jury (R. 185, 186, 187, 188, 189, 190, 191, 192, 197, 202, 205, 206, 208, 209, 210, 211, 213, 214, 215, 217, 218, 221) we must logically conclude that the jurors were eager to be enlightened as to what specifically constitutes corroborative evidence. The above-quoted portion of the instructions of the Court below was food for their hungry minds. We cannot but believe that with this equivocal (and we submit, erroneous) instruction the jurors were left to their deliberations with a clear misstatement of the law to guide them on a vital issue. It would be pure fantasy to conclude that the jurors did not rely upon this erroneous instruction in arriving at their verdict of guilty.

The trial Court erred in instructing the jury as to what constitutes corroborative evidence and on this ground alone the judgment of the Court below should be reversed.

CONCLUSION.

Clearly, the multiple errors committed by the Court below in this case present an array of individual and combined injury and prejudice, which we respectfully submit call for reversal.

Dated, San Francisco, California,
February 23, 1955.

Respectfully submitted,
A. J. Zirpoli,
C. Harold Underwood,
Attorneys for Appellant.

No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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No. 14,516

IN THE

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Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Sections 1621 and 3231 of Title 18 United States Code, and Sections 1291 and 1294(1) of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted on June 3, 1953, for perjury committed before the grand jury on May 6, 1953 (Tr. 3-7). The case was tried by a jury before

United States District Judge Edward P. Murphy (Tr. 48). The foreman of the grand jury, Charles St. John, testified that appellant appeared before the grand jury in connection with an income tax evasion investigation concerning Mr. Samish and Mr. Flynn (Tr. 50). Mr. St. John administered an oath to appellant that he would testify to the truth, the whole truth and nothing but the truth (Tr. 51). The particular type of income that the grand jury was investigating at the time appellant testified was the gambling income of Mr. Samish and Mr. Flynn (Tr. 51). A portion of the transcript of the grand jury proceedings on May 6, 1953, was read into the record (Tr. 58). It was stipulated that appellant's testimony was material to the proceedings before the grand jury (Tr. 64). Appellant testified before the grand jury that he knew Irving Baskin and Tiny Heller (Tr. 70). He said that he had placed very small bets with Mr. Heller amounting to twenty or thirty dollars (Tr. 71) and that he had not won more than one hundred dollars (Tr. 72). The testimony alleged to be false in the indictment was read into the record (Tr. 73-75). This testimony was as follows:

> "Q. (By Mr. Olney.) I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollars bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turn counted the $38,000 in these one thousand dollars bills to you and give you the bills.

A. I didn't get them, sir.

Q. Did that happen?

A. No sir.

Q. Anything like it?

A. No sir.

Q. Did you ever go there to the bank with this Baskins?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Q. Has Mr. Baskin ever delivered any money to you?

A. No sir.

Q. Even one cent?

A. Never had occasion to.

Q. (By Mr. Burke.) Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

A. That's correct, Mr. Burke.

Q. (By the Foreman.) Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir.

Q. And you never received $38,000 from Mr. Baskin?

A. No sir."

Irving Baskin testified that he had known the appellant since approximately 1941 or 1942 (Tr. 77). He had done accounting work for Tiny Heller dur-

ing the years 1946 and 1947 (Tr. 78, 81). Mr. Heller's occupation during those years was that of a betting commissioner or a person who takes wagers (Tr. 78). His betting commission office was in back of a liquor store (Tr. 80). Irving Baskin, the witness, was familiar with Mr. Heller's handwriting and testified that U. S. Exhibits 2, 3, 4, 5, 6, 7, 8 and 9 were in Heller's handwriting (Tr. 83-88). Baskin also testified to the manner in which these records were kept (Tr. 82-87). He said Exhibit No. 2 was a running account of bets made during the day (Tr. 82), that Exhibit No. 3 was the kind of record on which Heller jotted down bets as they came over the telephone (Tr. 83), that Exhibit Nos. 4 and 5 were books of Heller's check stubs (Tr. 84-85), and that Exhibit Nos. 6, 7 and 8 were checks in Heller's handwriting dated October 28, 1946, October 30, 1946, and December 3, 1947, respectively (Tr. 86-87). Appellant was in the Heller establishment near the end of Mr. Heller's operation three or four times a week (Tr. 88). The witness on several occasions delivered envelopes to appellant at his liquor store (Tr. 89). In early December, 1947, Baskin testified that Tiny Heller, in appellant's presence, gave him checks and told him to "get them cashed into one thousand dollar bills and then give them to Jimmy." (Tr. 90-91). The total amount of these checks was $38,000 (Tr. 92). Appellant and Baskin then left the Heller establishment and went to the Bank of America approximately two blocks away (Tr. 92). Baskin then went to the window of the teller, Herman Worth, and re-

ceived 38 one thousand dollar bills for the checks (Tr. 93-94). The Chief Clerk, Earl Madieros, okayed the checks (Tr. 94). Baskin then counted the money over to appellant and appellant "took the money" and "put it in his pocket." (Tr. 95-96). Baskin testified that the transaction was completed by approximately 12:30 (Tr. 96).

F. W. Whitted was employed from April, 1941, in Tiny Heller's gambling establishment until Tiny Heller went out of business (Tr. 100, 103). Part of his duties was determining the odds on particular sporting events (Tr. 101). Appellant was in the gambling establishment five or six times a week for several years according to Mr. Whitted (Tr. 102). In 1946 and 1947 the witness observed Mr. Arena making large bets from one hundred to two or three thousand dollars (Tr. 105). Whitted recorded some of these bets (Tr. 106). U. S. Exhibit No. 10 reflected a bet recorded by Whitted for appellant (Tr. 108). This bet resulted in a win of $7,900 (Tr. 125). This transaction occurred on October 26, 1946 (Tr. 109). Mr. Heller testified that this bet was made by Mr. Arena but on behalf of Mr. Samish (Tr. 131). U. S. Exhibit No. 2 showed a winning bet of $4,050 to the "S.A." account. U. S. Exhibit No. 4 contains check stub, #1253, for $11,950 dated October 28, 1946, made payable to cash, for the "S.A." account with $4,050 as one of the items listed under remarks and $7,900 listed as the other. U. S. Exhibit No. 6 is a check, numbered identically with the check stub (Ex. 4), made out to cash for $11,950, dated October 28, 1946.

These exhibits, taken together, reflect a bet made by appellant which resulted in payment on behalf of the "S.A." or Samish-Arena account. According to Mr. Whitted, Jimmy Arena placed all bets for Arthur Samish (Tr. 120-121). Previously when Samish placed the bets himself, his bets were recorded under the initials "A.S.". When Mr. Arena placed the bets they were recorded as "S.A." (Tr. 121). Whitted testified that appellant had made a bet for himself with Mr. Whitted at the Heller establishment which reflected a win of $2,000 (U. S. Exhibit No. 9, Tr. 114, 115). Whitted also identified Heller's handwriting on U. S. Exhibit Nos. 2, 3 and 10, and testified that these records were kept in the regular course of the Heller business (Tr. 116, 118).

Rosalind Heller, Mr. Heller's widow, worked in the betting commission office on some occasions (Tr. 133, 134). Sometimes she recorded bets for him (Tr. 134). Heller also conducted business at home (Tr. 134). Mrs. Heller identified U. S. Exhibit Nos. 2, 3, 4, 5, 6, 7 and 8 as business records kept in connection with his betting commission business in his hand writing (Tr. 134-138). She stated that " 'S.A.' means 'Artie Samish Account to James Arena' " in the Heller records (Tr. 142). U. S. Exhibit No. 3 was identified by her as a record for the week ending November 30, 1947 (Tr. 142). This record showed a plus balance of $34,000 (Tr. 143; U. S. Exhibit No. 3). U. S. Exhibit No. 5 contained a check stub to the "S.A." account dated December 3, 1947, for $6,050. U. S. Exhibit No. 8 was a check of Mr. Heller's, with the

same number as the check stub, for $6,050 dated December 3, 1947 (Tr. 143).

Earl Madieros, an Assistant Cashier with the Bank of America, testified that on December 4, 1947, $38,000 was paid on behalf of Tiny Heller (Tr. 159). The teller who made the payment of these checks was Herman Worth (Tr. 159). The payment was made for four checks, one in the amount of $6,050 (U. S. Exhibit No. 8) and three other checks in the amounts of $8,900, $9,350 and $13,700 (U. S. Exhibit No. 11). These checks were endorsed by Irving Baskin (Tr. 164). Payment was made during the noon hour (Tr. 164). At the conclusion of Madieros' testimony, a portion of the grand jury testimony was read into the record (Tr. 168, 169), in which appellant, when asked concerning five cards described as Sacramento Football Selections, dated October 26, 1946, declared that he knew nothing about these cards (Tr. 169). In this portion of the grand jury testimony Mr. Arena also denied that he placed any bets with Fred Whitted or that he placed the bets on October 26, 1946, which are represented by United States Exhibit No. 10.

The second count of the indictment charged that appellant won $2,000 on a bet placed with one Jack Roland. The court held that there was direct evidence from Mr. Roland's records that appellant had won such a bet but that, in the absence of corroborative evidence, appellant should be acquitted on that count of the indictment. Mr. Roland's testimony and U. S. Exhibit No. 14 were stricken and the jury instructed to disregard them (Tr. 178). The jury re-

turned a verdict of guilty as charged (Tr. 26). Appeal was then timely made to this Court from the judgment of conviction (Tr. 35).

STATUTES.

18 *United States Code,* Section 1621:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

28 *United States Code,* Section 1732 (a):

(a) In any Court of the United States and in any Court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such

act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

QUESTIONS PRESENTED.

1. Was the evidence sufficient?

2. Were Tiny Heller's books properly admitted under Section 1732 of Title 28 as records kept in the ordinary course of business?

3. Was the indictment duplicitous?

4. Were the instructions proper?

SUMMARY OF ARGUMENT.

I. THE EVIDENCE WAS SUFFICIENT.

Appellant claims that the corroboration rule in perjury cases requires that the ultimate fact in issue, in this case the disposition of the money, be directly proved either by the testimony of another witness or by evidence which "of itself" proves guilt. Appellant admits that Baskin's other testimony was corroborated.

1. The Government Need Not Prove Its Case Twice.

Corroboration is required in perjury and rape cases and for the admissibility of a confession. This Court and the Supreme Court have indicated that the scope of the "corroboration" required is the same in all these cases. The corroboration need not "of itself" prove guilt. It must merely substantiate the testimony of the single witness who has testified directly that the defendant's oath was false. The government is not required to prove its case twice. The corroboration alone need not establish the guilt of the defendant beyond a reasonable doubt.

2. Corroboration May Be Established by Circumstantial Evidence.

Appellant declares that the *corroboration* may not be established by circumstantial evidence. The authorities are to the contrary. Requiring that the corroboration of Baskin's testimony be established by direct evidence is not requiring "corroboration" at all but is requiring two witnesses to testify to the same overt act. This requirement is the rule in treason cases. It is not a requirement of corroboration. This Court should not substitute the rule in treason cases for the rule which has previously obtained in cases of perjury.

3. The Corroboration Was Sufficient.

The corroborating evidence in this case was very strong. Baskin's testimony was corroborated in every detail except one. There was no direct testimony that Baskin handed the money to Arena besides his own. Requiring this testimony, however, would be

requiring the proof for treason cases not requiring corroboration of Baskin's testimony.

II. THE BUSINESS RECORDS OF TINY HELLER WERE ADMISSIBLE.

The business records of Tiny Heller were identified by three witnesses. Three witnesses testified that they were in Heller's handwriting. Three witnesses testified as to the manner in which these records were kept. Three witnesses testified that the records were kept in the regular course of business. Tiny Heller was dead at the time of the trial. Section 1732 of Title 28 provides for the admissibility of all records made in the regular course of business. These records were admitted pursuant to that section. A proper foundation was laid for these records' admissibility, and they would have been admissible even prior to the enactment of Section 1732. It has been universally held that persons familiar with business records may testify with respect to the abbreviations used therein.

III. THE INDICTMENT WAS NOT DUPLICITOUS.

All the particulars in which a defendant swears falsely at the time charged may be embraced in one count. In the present case the false testimony had to do not with different subjects or transactions but with one transaction and one subject matter—the payment of $38,000 to appellant on behalf of Artie Samish. The five different "offenses" claimed by

appellant relate in fact only to a single offense involving a multiplicity of ways and means. The single offense was swearing falsely to the grand jury with respect to the $38,000 transaction.

IV. THE TRIAL COURT'S INSTRUCTIONS WERE PROPER.

1. The Instructions on Corroboration Were Proper.

The Court's instructions on "corroboration" were in accord with the great weight of authority. Appellant's objections consist in a misconception of the requirement of corroboration for perjury cases. The law does not require that the corroboration be established either by direct evidence or prove the case beyond a reasonable doubt.

2. The Court Properly Refused to Give Appellant's Requested Instruction No. 12.

The Court's instruction on appellant's other false statements to the grand jury was proper. Appellant's complaint amounts to nothing more than a preference for his own language. The Court is free to use language of its own in charging a jury so long as the charge states the applicable law.

ARGUMENT.

I. THE EVIDENCE WAS SUFFICIENT.

Appellant's argument attacking the sufficiency of the evidence is based on the unique rule in perjury cases that the case must be proved by one witness plus

corroborative circumstances. This rule originated in the limitation of ancient common law that one oath could not prevail against another. *Wigmore, Third Edition,* Section 2040. Originally it was necessary in order to sustain a conviction for perjury that the falsity of the oath be proved by the sworn testimony of two or more witnesses. This rule was early modified so as to permit a conviction upon the sworn testimony of one witness if that testimony was supported by proof of "corroborative circumstances." *United States v. Palese,* 133 F. 2d 600, 602. See *Wigmore,* Section 2042. The rule has, however, been soundly criticized. In *State v. Storey,* 182 N.W. 613, 15 A.L.R. 629, the Court pointed out that it was inconsistent to hold that evidence sufficient to hang a man for murder was insufficient to convict him for perjury. *Wigmore* states, "The rule is in its nature now incongruous in our system." *Wigmore,* Section 2041. See also *Goins v. United States,* 99 F.2d 147, 149; *Marvel v. State,* 131 A. 317, 42 A.L.R. 1058.

Appellant admits that the government has satisfied the "one witness" requirement of the rule (App. Br., page 35). Appellant argues, however, that the corroboration of Irving Baskin's testimony was insufficient as a matter of law. After reviewing the evidence in the light more favorable to the *defendant,* appellant declares that the government did not corroborate the testimony of Baskin in that part of his testimony in which he stated "he accompanied appellant to the bank and there turned over 38 one thousand dollar bills to appellant." Appellant ad-

mits, however, that it could be inferred from the corroborative evidence that "Mr. Baskin presented the checks and received $38,000 in cash (App. Br., page 39)." He further admits that appellant laid bets with Mr. Heller over a period of years and there was a net win in favor of Samish on November 30, 1947 (App. Br., pages 41, 49). Appellant rests his case on the ground that the other testimony in the case was not corroborative of Baskin's testimony as to the "disposition" of the money (App. Br., page 49).

Appellant is in fact claiming that the corroboration rule in perjury cases requires that the ultimate fact in issue, in this case the disposition of the money, be directly proved either by the testimony of another witness (see App. Br., pages 66, 67) or by proof "inconsistent with the innocence of the accused—evidence which 'of itself' " proves guilt (App. Br., page 49).

1. The Government Need Not Prove Its Case Twice.

Appellant argues that the *corroboration* independently must prove the defendant guilty beyond a reasonable doubt. In effect appellant argues that the government must prove its case twice. In this connection he cites *United States v. Neff,* 212 F.2d 297. In that case the Court held that the corroborative evidence must be "evidence aliunde—evidence which tends to show the perjury independently." It should be noted that the Court used the words "tends to show." The Court further stated as the test of whether or not the corroborative evidence was suffi-

cient is whether "the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statements." *United States v. Neff,* supra, at page 306. This case does not stand for the proposition advanced by appellant that the corroborative evidence must "of itself" prove guilt. This Court in the case of *Pearlman v. United States* (9th Cir.), 10 F.2d 460, 462, has held that evidence aliunde "need not be such as to alone establish the fact beyond a reasonable doubt."

There are two cases other than perjury where corroboration is required. A confession must be corroborated, and in rape cases the testimony of the prosecutrix must be corroborated. The Supreme Court, in the case of *Warszower v. United States,* 312 U.S. 342, held that the corroboration necessary to admit a confession of the defendant is the same as required in a perjury case.

This Court has long held that the independent evidence required to corroborate a confession need not alone establish the crime beyond a reasonable doubt. It is sufficient if, when considered in *conjunction with a confession,* "it satisfies the jury beyond a reasonable doubt that the offense was in fact committed, and the plaintiff . . . committed it." (Emphasis added.) *Pearlman v. United States,* supra, at page 462.[1] See also *D'Aquino v. United States* (9th Cir.), 192 F.2d

[1]This case was recently approved by the Supreme Court in the cases of *Smith v. United States,* 348 U.S. 147, 156, and *Opper v. United States,* 348 U.S. 84, 92.

338, 357; *Wiggins v. United States* (9th Cir.), 64 F.2d 950, cert. den.; *Davena v. United States* (9th Cir.), 198 F.2d 230.

The "corroboration" in rape cases also need not independently establish the commission of the crime beyond a reasonable doubt. *Miller v. United States,* 207 F.2d 33, 35; *Ewing v. United States,* 135 F.2d 633; *McGuinn v. United States,* 191 F.2d 477, 478.

This Court has treated corroboration in perjury cases analogously to that required in the other cases where corroboration is necessary. See *Vetterli v. United States,* infra, at 293, where the court commented that the corroborative evidence need not of itself establish guilt beyond a reasonable doubt. It is only corroboration that is required, not the two witnesses which the Constitution requires in treason cases. Corroboration in perjury cases must fortify and substantiate the testimony of the one witness who testifies directly to the falseness of the oath. The cases have never required that the corroboration must "of itself" prove the offense charged.

In *United States v. Hiss,* 185 F.2d 822, the alleged perjury was that the defendant falsely swore he had not turned over copies of State Department documents to Whittaker Chambers or any other unauthorized person. Mr. Chambers testified that Hiss gave him the documents. The Court found there was sufficient corroboration in the proof that the State documents had been available to Hiss, and that the copies had been made on his typewriter.

In *United States v. Henderson,* 185 F.2d 189, the perjury was with reference to the interstate transportation of a woman for immoral purposes. The Court held that proof that the defendant registered at a hotel with the woman was sufficient corroboration of the woman's testimony that the defendant had transported her.

In *Miranda v. United States* (9th Cir.), 196 F.2d 408, where the issue was whether the defendant had in fact made the alleged perjurious statement, this Court held that the testimony of "one witness" was sufficiently corroborated by a notation made by that very witness.

As this Court said in *Vetterli v. United States* (9th Cir.), 198 F.2d 291, 293, "The rule of proof required in perjury cases prescribes that the uncorroborated testimony of one witness is insufficient; it does not . . . 'relate to the kind or amount of other evidence required. . . .' In the event the corroborative evidence 'substantiates' the testimony of the single witness it is sufficient." See also *Hammer v. United States,* 271 U.S. 620, 627; *Hashagen v. United States,* 169 Fed. 396; *Hart v. United States* (9th Cir.), 131 F.2d 59.

2. Corroboration May Be Established by Circumstantial Evidence.

It is appellant's position that "corroboration" may not be established by circumstantial evidence. In his opinion only direct testimony that Baskin transferred the money to him in addition to Baskin's testimony

that the money was so transferred would be sufficient to establish the charge. There is no method by which this could be established "directly" without another witness testifying to the same transaction as Baskin. In brief, appellant is asking that the Court establish the same requirements in the perjury case as is required in a prosecution for treason. Appellant is asking that two witnesses testify to the same overt act. This is not the rule in perjury cases. As stated in *Wigmore,* Section 2042, perjury is vitally distinguishable from treason in the feature that "a single witness suffices if corroborated."

Appellant cites *Radomsky v. United States* (9th Cir.), 180 F.2d 781, for his authority that circumstantial evidence does not suffice. But this case does not bear on the question of whether or not the *corroboration* must be direct. It merely refers to the testimony of the "one witness." The same is true in *McWhorter v. United States,* 193 F.2d 982. That case merely held that a contradictory statement by the defendant is not sufficient evidence of perjury where the "one witness" merely testified that the defendant made the contradicting statement.

In the early case of *United States v. Hall,* 44 Fed. 864, the Court said, "It is now well settled that such a conviction [for perjury] may be had on the evidence of one witness supported by proof of corroborating *circumstances.*" (Emphasis ours.) This Court stated the same rule in *Catrino v. United States* (9th Cir.), 176 F.2d 884, declaring that one witness

plus corroborating circumstances was sufficient. To the same effect see *United States v. Remington,* 191 F.2d 246. Even in the Third Circuit the rule, since *United States v. Palese,* supra, has been that only corroborative *circumstances* are necessary.[2] The substitution of the word "evidence" for the word "circumstances" in the *Neff* case (page 306) is not sufficient grounds for requiring this Court to substitute the rule in treason cases for that which has in the past obtained in cases of perjury.

It is not even clear that perjury may not be established by circumstantial evidence alone. To be sure, this Court in the *Radomsky* case, supra, acted as if some direct evidence was required but it did so on the grounds that "No contention is here made that such is not the law as applied to perjury in the federal courts." There is state authority to the contrary. *Marvel v. State,* supra. Federal cases have held that in some circumstances perjury may be proved by circumstantial evidence alone. *Fotie v. United States,* 137 F.2d 831.

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[2]The language of *United States v. Rose,* 215 F.2d 617, and *United States v. Neff,* supra, is somewhat contrary to the rule established in the leading cases on the subject in the Third Circuit. *United States v. Palese,* supra; *United States v. Seavey,* 180 F.2d 837. The *Rose* case, however, merely held that the statement upon which the perjury charge was based was equivocal and that, as a matter of law, there was a reasonable doubt despite the jury verdict of the guilt of the defendant. The *Neff* case held what seems incorrect as a matter of sound reasoning: that one could not infer that a person had ever attended a Communist meeting from the fact that he was a member of the Communist party or that this fact did not corroborate the testimony of a witness that the defendant had in fact attended such a meeting.

The necessary corroboration in rape cases can be supplied by circumstantial evidence. See *Ewing v. United States,* supra, where the Court said "But to safeguard the defendant by requiring corroboration . . . is one thing. To throw around him a wall of immunity requiring the testimony of an eye witness or 'direct evidence,' which is more than circumstantial . . . is another." *Ewing v. United States,* supra, at pages 635, 636. See also *McGuinn v. United States,* supra, at page 478.

The present case illustrates the danger of a rule requiring more than one witness directly establishing the falseness of the defendant's oath. Tiny Heller was dead as was also the teller, Herman Worth, the lack of whose testimony appellant argues should be construed against the government (Tr. 187). The only living eye witness to the transaction itself was Irving Baskin. The corroboration, therefore, could only have been established by circumstances. Perjury can be committed in circumstances which would not allow more than one witness to be aware of its falsity. Must the Court decide that perjury may not be established where the circumstances of the case allow but one witness to have direct knowledge of the facts? No reason in policy or in authority has been advanced to require this Court to come to this conclusion.

3. The Corroboration Was Sufficient.

The corroborating evidence in this case was very strong. It quite probably was enough to establish

the falseness of the appellant's oath by itself. Arena had testified before the grand jury that he had made bets with Tiny Heller but that they were very small ones—twenty or thirty dollars (Tr. 70, 71). He claimed that he had never won more than a hundred dollars (Tr. 72). He said that he had never received a dollar or $38,000 on behalf of Artie Samish or anyone else (Tr. 74). The subject of the indictment for perjury in this case was appellant's sworn testimony that he had not accepted $38,000 from Irving Baskin on behalf of Samish (Tr. 73).

Whitted, an employee of Tiny Heller from 1941 to 1947 (Tr. 100), testified that Arena had regularly placed bets with Heller since 1941 (Tr. 104). From 1941 to about 1946 Arena's bets were small (Tr. 105), but in 1947 and 1948 the bets ranged from $100 to two or three thousand dollars (Tr. 105). Whitted testified that Samish, in early years, had placed bets himself (Tr. 102), but later he placed no bets for himself, and appellant placed all bets on Samish's behalf (Tr. 120, 121). The bets, according to Mr. Whitted, were recorded as "A.S." when Samish placed the bets himself (Tr. 120-122), but when Arena placed the bets for Samish, the initials used to record the bets were "S.A." (Tr. 121).

Whitted further testified that from the year 1945 all settlement of Samish's bets were made with appellant (Tr. 125). He identified United States Exhibit No. 3 as part of Mr. Heller's records (Tr. 118). United States Exhibit No. 3 shows that on the week ending November 30, 1947, there was a plus balance

in the account of "S.A." of $34,800.[3] Mrs. Heller, who had worked for her husband (Tr. 134), identified United States Exhibit No. 5. Exhibit No. 5 contained a check stub dated December 3, 1947, covering a check to the "S.A." account for $6,050. Mrs. Heller testified that the stub notation meant " 'Artie Samish Account to James Arena' " (Tr. 142).

The bank clerk testified that on December 4, 1947, four checks were cashed by Irving Baskin amounting in total to $38,000 (Tr. 160). United States Exhibit No. 11, which was identified by the bank clerk, was a check drawn by Mr. Heller on December 3, 1947, for $6,050. Both the check stub (U. S. Exhibit No. 5) and the check (U. S. Exhibit No. 11) bore the same number. The jury was entitled to infer that the check stub for this check was United States Exhibit No. 5 which reflected the check was paid to James Arena on behalf of the "S.A." account. Three other checks were cashed that day with T. Heller as payee. The total of the checks Baskin cashed was $38,000 (U. S. Exhibit No. 11).

Whitted testified that he recorded a bet made by Arena on behalf of Samish on October 26, 1946 (Tr. 109). U. S. Exhibit Nos. 4, 6, 2-1 and 10 established that this bet was paid to the "S.A." or Samish-Arena account by check on October 28, 1946. Heller's records established that another bet was paid by Heller on behalf of the "S.A." or Samish-Arena account to James Arena on October 30, 1946 (U. S.

[3]U. S. Exhibit No. 3 was admitted for all purposes (Tr. 141) as appellant apparently admits at page 60 of his brief.

Exhibit Nos. 2-2, 4; Tr. 138, 141). This win was paid by a check for $6,150 (U. S. Exhibit No. 7). Appellant admits that U. S. Exhibit No. 9, in conjunction with Whitted's testimony establishes that appellant made a bet at the Tiny Heller establishment which resulted in a win of $2,000 (App. Br., p. 44; Tr. 114, 115; U. S. Exhibit No. 9). Arena testified falsely to the grand jury when he stated that he had never won more than one hundred dollars in bets with Tiny Heller. Whitted's testimony established that appellant testified falsely before the grand jury when he denied any knowledge of the October 26, 1946, gambling transaction which resulted in a payment to the Samish-Arena account of $11,950. The fact that he testified falsely in other respects on the same occasion on which he was accused of testifying falsely went to show his intent in making the statement contained in the indictment, and tended to negate any question of mistake or inadvertence.

Mr. Heller was dead. He could not testify as to the transactions of December 3 and 4. His records, however, were available and they established that Artie Samish had made a large win for the week ending November 30, 1947. The "S.A." account both Whitted and Mrs. Heller testified was Arena on behalf of Samish.

Appellant has discussed the exhibits in this case. He has refused, however, to make any inferences from those exhibits. He has not connected the exhibits with the testimonies which interpreted them. The records support and corroborate Mr. Baskin's story

that he received some $38,000 from the bank in connection with a large gambling win by the "S.A." or Samish-Arena account. Mr. Arena swore that he had never received $1 or $38,000 on behalf of Samish. The evidence, wholly apart from Baskin's direct testimony, showed that he acted as a runner for Samish and that bets were placed over a series of years by Tiny Heller under a "S.A." or Samish-Arena account. The uncontradicted evidence showed that that account had a $34,000 win prior to December 4. Mr. Heller's check stub indicated that part of that win was paid by Heller's personal check. The proceeds of that check and other checks amounting in total to approximately the amount listed in Exhibit No. 3 as the Samish-Arena winnings for the last week of November, were given to Irving Baskin by the bank on the date and time he testified.

Baskin's testimony was corroborated in every detail except one. There was no direct testimony that Baskin handed the money to Arena besides his own. But requiring that testimony would not be requiring corroboration of Baskin's testimony but would be requiring two witnesses to testify to the same overt act. This requirement is the rule in treason cases. It is not a requirement of *corroboration*. Corroboration in cases involving confessions, in rape and in perjury means only that the witness's testimony does not stand alone; that it is fortified and substantiated by other testimony which indicates that the witness has testified truthfully or that the confession is in accord-

ance with the facts. See *Weiler v. United States,* 323 U.S. 606.

The testimony in this case, apart from Baskin's testimony, is sufficient to establish "of itself" that appellant swore falsely, but we do not believe that the law requires this degree of proof. We respectfully submit that a jury could find that the corroborative evidence plus Mr. Baskin's testimony establishes the guilt of appellant beyond a reasonable doubt.

II. THE BUSINESS RECORDS OF TINY HELLER WERE ADMISSIBLE.

Appellant complains of the admission in evidence of Exhibits 2, 3, 4, 5, 6, 7 and 8 and the testimony of the witnesses Rosalind Heller and F. W. Whitted relating thereto. These exhibits were identified as business records of Tiny Heller (Tr. 83-87, 113-120, 135-140). Irving Baskin, F. W. Whitted and Mrs. Heller all testified to the manner in which these books were kept. They also testified that the records were in the handwriting of Mr. Heller (Tr. 83-87, 113-120, 135-140). At the time of the trial Mr. Heller was deceased (Tr. 133).

F. W. Whitted and Mrs. Heller all worked at Heller's betting establishment (Tr. 79, 100, 134). F. W. Whitted recorded bets made by James Arena on behalf of Artie Samish and recorded those bets in Mr. Heller's records under the designation "S.A." (Tr. 120-121). Mrs. Heller also testified that " 'S.A.' " in

Mr. Heller's books "means Artie Samish Account to James Arena." (Tr. 142). All bets received by Tiny Heller were recorded on the type of record represented by U. S. Exhibit No. 3 (Tr. 118).

Section 1732 of Title 28 provides for the admissibility of all records made in the regular course of business. All other circumstances of the making of the record may be shown to affect its weight "but such circumstances shall not affect its admissibility." The purpose and effect of this statute is to make admissible any writing if made in the regular course of any business without the strict proof of authenticity which had theretofore been required. *Harper v. United States,* 143 F.2d 795.

It is not required that the person testifying in respect to the records have personal knowledge of their contents. *Wheeler v. United States,* 211 F.2d 19, 23. Even before the enactment of Section 1732 business records were admissible if made by persons having knowledge of the facts by "proof of their handwriting, if dead, insane, or beyond the reach of process." *Levey v. United States* (9th Cir.), 92 F.2d 688; *Wilkes v. United States* (9th Cir.), 80 F.2d 285, 290. When the admissibility of the record is in issue, whether the authentication of the record is sufficient is in the discretion of the Court. *Lewis v. United States* (9th Cir.), 38 F.2d 406. It has been universally held that persons familiar with the record may testify as to the meaning of abbreviations used in it. See *Meyer v. Everett Pulp & Paper Co.* (9th Cir.), 193 Fed. 857, and cases collected in 100 A.L.R. 1465.

Appellant complains that there was not sufficient foundation for the admission of the Heller records (App. Br., p. 60). We fail to see how any better foundation could have been laid without the testimony of Mr. Heller himself. Mr. Heller's handwriting was proved by three witnesses. Three witnesses testified that Heller recorded bets in the manner shown by the exhibits. Two witnesses testified that they had observed bets recorded for the Samish-Arena account in the manner recorded in United States Exhibit No. 3. Counsel for appellant objected at the trial to testimony concerning these exhibits on the ground that the witnesses were not personally familiar with the specific transactions reflected on the exhibits (Tr. 118, 142). It is this very objection which Section 1732 was designed to invalidate. The lack of personal knowledge of the transactions involved in the instant case on the part of the witnesses testifying with respect to the Heller records could be shown to affect the weight of the testimony. The weight of the testimony is not the question here.

III. THE INDICTMENT WAS NOT DUPLICITOUS.

It has been universally held that *all* the particulars in which the defendant swore falsely at the time charged may be embraced in one count and proof of the falsity of any one will sustain the count. 2 *Wharton's Criminal Law,* Sections 1567, 1582. When a defendant swears falsely before a grand jury on many occasions the falsity extends to a number of transactions relating to the grand jury's investigation. In

United States v. Harris, 311 U.S. 292, in an appeal from an order of the District Court quashing an indictment for perjury, the Supreme Court reversed the District Court and upheld the validity of an indictment that charged in one count that the defendant had sworn falsely when she denied (1) that she had gone to Ray Born in 1932 and talked to him, (2) that she had spoken to Lou Kissel and (3) that she paid money to the said James McCullough. The charge in the *Harris* case related to one proceeding in which the defendant swore falsely with respect to several different particulars. The crime in a perjury case is swearing falsely. The subject matter of the false testimony may relate to several different transactions. The falsity with respect to these several transactions, however, taken together constitute one crime, that of swearing falsely before the grand jury. See *United States v. Goldstein,* 168 F.2d 666.

The present case, however, does not involve false swearing with respect to several different transactions. The indictment set forth in haec verba the testimony of appellant which related to his acceptance of $38,000 from Irving Baskin on behalf of Artie Samish. The "five different offenses" set forth by appellant at page 30 of his brief relate only to that transaction. The questions are phrased in different ways but they have but one object. That object was the truth concerning the transaction in which appellant received $38,000 as gambling winnings from Irving Baskin. The grand jury did not obtain the truth but obtained falsity expressed in five different ways.

Appellant quotes a dictum from *Seymour v. United States,* 77 F.2d 577, indicating that the indictment there, if the charges had been joined in one count, *might* have been duplicitous. In that case, however, the different counts of the indictment related to *different matters* to which the defendant swore falsely at the hearing.

In the present case the indictment had to do not with different subjects or transactions but with one transaction and one subject matter—the payment of $38,000 to appellant on behalf of Artie Samish. *United States v. Orman,* 207 F.2d 148, cited by appellant, was a contempt case but the Court held (at page 160) that where separate questions seek to establish but a single fact or related to but a single inquiry, only one penalty for contempt may be imposed. The *Orman* case, far from upholding appellant's position that the indictment here is duplicitous, holds that falsity with respect to a "single inquiry" gives rise to but one crime. *United States v. Coen,* 72 F. Supp. 10, expressly held that it was proper to charge in a single count the commission of the crime of perjury by including other assignments of falsity with respect to the same transaction. What appellant calls "five different offenses" were in fact but a single offense involving a multiplicity of ways and means of doing one thing—testifying falsely with respect to the $38,000 transaction. A series of acts constituting but one offense, even though involving a multiplicity of means, may be charged in one count. *Greenbaum v. United States* (9th Cir.), 80 F.2d 113;

Hovley v. United States (9th Cir.), 277 Fed. 788; *United States v. Crummer,* 151 F.2d 958.

IV. THE TRIAL COURT'S INSTRUCTIONS WERE PROPER.

1. The Instructions on Corroboration Were Proper.

The Court instructed the jury that corroboration was required in the following language:

> "In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath. The falsity of the statement made under oath must be proved by clear and convincing evidence. The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidence by the testimony of two independent witnesses, or by one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted."

This instruction has been approved innumerable times. *United States v. Palese,* supra; *United States v. Goldstein,* supra; *Hashagen v. United States,* supra; *United States v. Hall,* supra; *United States v. Seavey,* supra; *Catrino v. United States,* supra.

Appellant, in his Specifications of Error No. 8 and No. 10, apparently desired that the Court instruct that circumstantial evidence could not supply the corroboration required by the rule. We have discussed this matter in connection with our argument on the sufficiency of the evidence. As we said there, the effect of such a construction of the law would be

to substitute the rule in treason cases for the rule which has previously obtained in perjury. Requiring "direct evidence" would not be a corroboration requirement at all. In every case it would be necessary to have two witnesses testify to the same overt act.

In his Specifications of Error No. 9 and No. 12 appellant repeats his argument with respect to the sufficiency of the evidence. He claims that the corroboration must "of itself" establish the falsity of appellant's statements. The Court instructed as follows:

> "By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy.
>
> The trustworthiness of the corroborative evidence is for you to determine."

The Court declared there must be evidence "independent of the testimony of a single witness which substantiates the testimony of that witness." The Supreme Court in *Weiler v. United States,* supra, held that corroborative evidence was sufficient if it "substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement." We repeat our contention made in discussing the sufficiency of the evidence. The govern-

ment need not prove its case twice. The jury should not be instructed that the corroborative evidence must of itself establish the guilt of the defendant beyond a reasonable doubt. Judge Murphy instructed that the corroborative evidence must be independent of the testimony of the one witness who has sworn to the falsity of the statement. He should not do more than that. More than that would require the government to prove the defendant's guilt beyond a reasonable doubt by the corroborative evidence alone. This is not requiring corroboration. This is setting a standard of proof required in ~~ordinary~~ TREASON cases.

2. The Court Properly Refused to Give Appellant's Requested Instruction No. 12.

The Court's instruction on other false statements adequately covered the matters urged by appellant in Instruction No. 12. There was in the case evidence that appellant had lied to the grand jury regarding his own bets and other bets of Samish in the Heller establishment. Appellant, as a matter of fact, urges in Specification of Error No. 5 that the admission of this evidence was error. The very instruction offered by appellant, however, demonstrates the admissibility of this evidence. This evidence went to show appellant's intent in making the false statement charged in the indictment. The Court's instruction properly limited the jury's consideration of these false statements to the question of appellant's intent. The instruction was a proper statement of the law. *Miranda v. United States,* supra.

Appellant in his brief declares that the instruction given "did not go far enough." He does not demonstrate how the requested instruction went any further. In order that a case be reversed, a defendant must complain of something more important than a preference for his own language. Appellant does not show how he was prejudiced by the instruction or, in fact, how the instructions differed. In our opinion the instructions are two different ways of saying the same thing. A Court is free to use language of its own in charging the jury so long as the charge states the applicable law. *Mitchell v. United States* (9th Cir.), 213 F.2d 951.

CONCLUSION.

We respectfully submit that the evidence was sufficient and that appellant received a fair trial. The judgment of conviction should be affirmed.

Dated, San Francisco, California,
May 4, 1955.

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No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

INTRODUCTION.

Appellee labors under a complete misconception of the requirements of corroboration in a perjury case and has, therefore, sought to apply principles of corroboration foreign to perjury cases. Throughout its brief it has resorted to gratuitous assumptions, unwarranted inferences and generalizations and distortions which, it is to be noted for remembrance, have been drawn in large part from evidence which at the trial and in our opening brief, as well, we denounced as inadmissible and incurably prejudicial to the substantial rights of appellant to a

fair trial. The record and observations hereinafter made will confirm what we have just stated.

Except to comment that "It is not required that the person testifying in respect to records have personal knowledge of their contents" (Appellee's Brief, p. 26) appellee has failed to otherwise comment upon or meet the arguments submitted by appellant in support of specifications of error 5 and 6 relating to the admissibility of the testimony of the witnesses, F. W. Whitted and Rosalind Heller. The arguments submitted in support of these specifications of error correctly state the law and the errors arising from the admission of the testimony of these two witnesses to which timely and proper objections were made so prejudiced the rights of appellant as to alone constitute grounds for reversal.

In this reply appellant relies essentially upon his main brief and proposes to discuss only those issues of law or questions of fact raised by appellee's brief.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE FIRST COUNT OF THE INDICTMENT.

Appellee contends that count I of the indictment was not bad for duplicity, and in support thereof it cites *United States v. Harris,* 311 U.S. 292, 61 S.Ct. 217. We quote from the opinion at page 218, "The sole question presented by the two cases is whether the indictments charge an offense under the statute. (18 U.S.C.A. 231)." No question of duplicity was involved. Appellant fails to see how this case bears upon the question presented herein.

In *United States v. Goldstein,* 168 F.2d 666, cited by appellee, the defendant did not object to the form of the indictment because of duplicity, he did not request the withdrawal of any specific assignment of perjury in the one count; he did move for a dismissal of the indictment at the close of the government's case and again at the close of all of the evidence. Of this the Court said at page 671:

> "That is not the equivalent of a request for a restricted submission. In the absence of such request and its denial, it is enough that one assignment in the count was adequately proved."

Appellant in the instant case made a timely motion for the dismissal of count I of the indictment which was denied (R. 12-15). This objection was not waived by appellant as occurred in the *Goldstein* case, nor was the prosecution in any way prejudiced by any failure to make proper and timely motions as occurred in the *Goldstein* case.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that, "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting *the offense* charged . . ." The indictment is sufficient if it clearly informs the defendant of the precise offense with which he is charged so that he may prepare his defense. *Barron, Federal Practice and Procedure,* Vol. 4, page 63.

Appellant submits that count I of the indictment is duplicitous and not in conformity with good pleading; that timely and proper motions were made to give the

government an opportunity to correct this defect; that the government has not been prejudiced by any waiver or failure by appellant; and that appellant was prejudiced in the preparation of his defense because of the multiplicity of offenses charged in count I of the indictment.

Also in this connection, appellee cites *United States v. Coen,* 72 F. Supp. 10 for the proposition that "it was proper to charge in a single count the commission of the crime of perjury by including other assignments of falsity *with respect to the same transaction*" (italics supplied). (Appellee's Brief, p. 29.) In the same breath, the Court says:

> ". . . where, as here there were several separate transactions, none of which has any relation or connection with the other, the false swearing, even though given in the course of continuous testimony in the trial of the contempt case, constituted separate offenses, and should have been charged in three counts of the indictment instead of one." (p. 12)

In the same opinion, the Court said:

> ". . . In a trial, the jury might conclude that the defendant's statement was true as to one or more of these transactions, but false as to the others and there would be no way of determining in event of a verdict of guilty, since there is only one count in the indictment, whether the finding applied to one, or to all three affidavits. These circumstances would seem to clearly establish the distinct nature of the several transactions and that the false swearing as to each one constitutes a separate crime, although given in one continuous appearance upon the witness stand." (pp. 12-13)

Appellant contends that count I of the indictment is subject to the same objections and that his motion to dismiss was, therefore, erroneously denied. The instant indictment does not involve the question of other *assignments* of falsity with respect to the same transaction.

Greenbaum v. United States, 80 F. 2d 113, *United States v. Crummer,* 151 F. 2d 958, both involving mail fraud indictments, and *Hovely v. United States,* 277 Fed. 788, involving an indictment under the Mann Act, are properly cited by appellee, but for a proposition which does not bear upon appellant's objection to the indictment in this case. Such indictments, because of the very nature of the offense to be charged, must necessarily set forth at least a minimum of factual allegations as to the means of committing the offense.

We repeat, that the crime of perjury is complete when a false answer is knowingly given to a question material to the inquiry, that a separate offense is committed when such answer is given to each such material question, and that count I of the indictment herein sets forth four such separate offenses.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

Unquestionably, appellant's specifications of error Nos. 2, 3, and 4 are based upon the well-established rule in perjury cases that the falsity of the oath must be proven by two witnesses or by one witness and corrborating evidence.

State v. Storey, 182 N.W. 613, cited by appellee, recites, with reference to the "two witness" rule, as follows:

> "This rule has been generally relaxed, but the greater number of decisions still sustain the rule that the positive testimony of at least one witness should be required, and if there is but one such witness, that *his testimony must be corroborated as to material facts;* that 'oath against oath' is never sufficient." (Italics supplied.)

Professor Wigmore, who is quoted by appellee, recognizes the fundamental soundness of the rule, approaching the underlying reasons therefor as follows:

> ". . . But when we consider the very peculiar nature of this offense, and that every person who appears as a witness in a Court of Justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind, . . ., we shall see that the obligation of protecting witnesses from oppression, or annoyances, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. . . ." *Wigmore,* 3d Ed., §2041.

The case of *Marvel v. State,* 131 A. 317, although rejecting the rule, states:

> "Even a casual examination of the authorities establishes the fact that the most universal rule in other jurisdictions is that no conviction can be had in a perjury case without the direct evidence of two witnesses or of one witness with corroborating evidence of some character."

It is interesting to note that in both the *Storey* and *Marvel* cases, the question was one of first impression

within the respective jurisdictions and also that in the *Storey* case the evidence emanated from the defendant, and in the *Marvel* case three witnesses testified to facts so conclusive and contradictory to the alleged perjurious testimony of the defendant so as to remove any dangers of falsification by prosecution witnesses and leave little room for doubt as to the falsity of the defendant's oath.

Appellee attributes to appellant admissions that he (appellant) placed bets with Mr. Heller over a period of years and that there was a net win in favor of Arthur Samish on November 30, 1947 (Appellee's Brief, page 14). A simple reading of Appellant's Opening Brief will disclose that in pointing out the utter failure of proof of the perjury charged, counsel for appellant indulged in every presumption and inference favorable to the prosecution, but in no sense waived appellant's objections to the admissibility of evidence or the use of exemplars as substantial evidence of the charge contained in count I of the indictment.

We repeat that there is an absolute lack of corroboration of Irving Baskin's testimony that in December, 1947, he turned $38,000.00 over to appellant at a bank in Oakland.

Appellant does not contend that the government should be compelled to prove its case twice; however, appellant does contend that the cases cited in his opening brief at pages 47, 48 and 49 properly set forth the quantitative rule of evidence to be applied by the federal Courts in perjury cases and that rule was not applied in the instant case.

Appellee's brief incorrectly attributes to appellant the proposition that "the corroborative evidence must "of itself" prove guilt. Appellant does contend that where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former and inconsistent with the innocence of the defendant and that the corroborative evidence must tend to show the perjury independently of the testimony of the direct witness.

Pearlman v. United States, 10 F. 2d 460, 462, cited by appellee (Appellee's Brief, p. 15) was a prosecution under the National Motor Vehicle Theft Act of 1919. That case can by no manipulation of reasoning bear upon the questions presented in this appeal. This is best illustrated by quoting from the Court's opinion at page 461:

> "The single question for this court to determine upon this writ of error is whether the proofs of the government measure up to the rule that there must be testimony tending to prove the corpus delicti independent of any confession of defendant . . ."

Smith v. United States, 348 U.S. 147 and *Opper v. United States,* 348 U.S. 84, cited by appellee (Appellee's Brief, p. 15, footnote) as approving the *Warszower* case, indeed do so, but again these cases deal with the question of the admissibility of extrajudicial confessions and admissions and the necessity of proof of the corpus delicti to render such statements admissible in evidence. The corroborating evidence there lays the foundation for the admission of extrajudicial admissions and confessions. In

perjury cases corroboration is required which tends to show the perjury independently—without regard to the testimony of the direct witness. The corroborating evidence in perjury cases cannot be considered in conjunction with the direct witness in perjury cases to determine whether or not the quantitative "two witness" rule of evidence has been satisfied. It must be independent of the testimony of the direct witness and inconsistent with the innocence of the defendant. *U. S. v. Neff,* 212 F. 2d 297, 307, and cases cited in appellant's opening brief, pages 48 and 49.

The case of *D'Aquino v. United States,* 192 F. 2d 338, also cited by appellee (Appellee's Brief, p. 15) only serves to further point up the fallacy of appellee's argument by stating, at page 357:

> "This court has held that it is unnecessary to make full proof of the *corpus delicti* independently of the defendant's confessions . . . The corroborative evidence need not independently establish the *corpus delicti* beyond a reasonable doubt. It is sufficient if the corroborative evidence, when considered in connection with the confession or admission, satisfied the jury beyond a reasonable doubt *that the offense was in fact committed . . .*" (Italics supplied.)

Clearly the Courts in these cases cited by appellee were discussing the foundation necessary to render admissible the confessions or admissions of the defendant, a matter completely foreign to the question of corroboration in perjury cases where there is but one witness who testifies directly to the falsity of the defendant's alleged perjurious statement.

The foregoing observations adequately demonstrate the illogical manner in which appellee has approached appellant's specifications of error 2, 3 and 4.

Appellee makes brief reference to "corroboration" in rape cases. (Appellee's Brief, p. 16.) The corroboration necessary in rape cases is *any* circumstantial evidence which supports the *prosecutrix's story. Ewing v. United States,* 135 F. 2d 633 at page 636. The corroboration necessary in perjury cases must tend to show the *perjury* independently of the testimony of the direct witness.

Appellant cannot agree with appellee's assertion that "this Court has treated corroboration in perjury cases analogously to that required in the other cases where corroboration is necessary." In citing *Vetterli v. United States,* 198 F. 2d 291 at page 293, counsel for appellee fails to point out to the Court that the *defendant's admission* was there under consideration. Of course, where the evidence emanates directly from the defendant the rule generally applied in perjury cases has been relaxed. We must not overlook the fact that in the *Vetterli* case there were three corroborating witnesses, in addition to the direct witness, all of whom contradicted the alleged perjurious statement of defendant, and one of whom testified as to admission of the defendant Vetterli. Thus, the analogy to other types of cases where admissions of a defendant must be corroborated.

Appellee's analysis of *United States v. Hiss,* 185 F. 2d 822, (Appellee's Brief, p. 16) is also oversimplified and distorted. The Court there stated the general rule at page 824 that:

> "(the) corroboration of the testimony of a single witness should be such that it supplies independent proof of facts inconsistent with the innocence of the accused . . ." (Italics supplied.)

In almost six pages of the opinion the Court reviewed the evidence against Mr. Hiss after which the Court states at page 830:

> ". . . The foregoing is an attempt NOT to summarize the *MASS OF EVIDENCE* introduced at the trial below, . . ."

This is but one illustration of appellee's method of resorting to distortions and generalizations.

Likewise, in summarizing the evidence in *United States v. Henderson,* 185 F. 2d 189 (Appellee's Brief, p. 17) appellee fails to accurately inform the Court as to all of the corroborating evidence upon which the conviction was sustained. Furthermore, in the *Henderson* case the Court states, at page 192, that the jury was not instructed as to necessity of more than the testimony of a single witness; that the defendant did not tender or request such an instruction, that defendant did not object to the instructions as given by the trial Court, and that on that state of the record there was no grounds for reversal.

The case of *Miranda v. United States,* 196 F. 2d 408, cited by appellee (Appellee's Brief, p. 17) was a prosecution under Section 746 (a)(1) of Title 8 U.S.C.A. for making false statements under oath as a witness in naturalization proceedings. Falsity of the statement was there admitted by the defendant. The sole issue was

whether or not the defendant had made the statement which he admits, *if it were made,* was false. Furthermore, the corroborating evidence was a notation, made by the direct witness some four years prior to the return of the indictment, of facts related to the direct witness by the defendant at that time. That notation was contained in the records of the Department of Justice, Immigration and Naturalization Service and was admissible in evidence as such (28 U.S.C.A. 1733). In effect, this was corroborative evidence emanating from the defendant—the best possible type of corroboration. But it must be borne in mind that this type of argument is beyond the question presented by specifications of error 2, 3 and 4, since there is no corroboration whatsoever of Irving Baskin's testimony that in December, 1947, he turned over thirty-eight one thousand dollar bills to appellant at a bank in Oakland.

Appellant does not contend that corroboration of the testimony of the direct witness cannot be established by circumstantial evidence contrary to the assertions of appellee. Nowhere in appellant's opening brief does appellant express the opinion that "only direct testimony that Baskin transferred the money to him in addition to Baskin's testimony that the money was so transferred would be sufficient to establish the charge" contained in count I of the indictment (Appellee's Brief, pp. 17 and 18). Of course, these propositions are contrary to well-established law as applied in perjury cases as cited by appellant in his opening brief at pages 34 through 49. Appellant does contend that the corroborating evidence must be strong, clear and convincing, it must

be inconsistent with the innocence of the defendant, and it must tend to show the perjury independently of the testimony of the direct witness.

Appellee's argument at pages 20 through 25 under the heading, "The Corroboration Was Sufficient" is the only attempt by it to meet squarely the issues raised by appellant's specifications of error Nos. 2, 3 and 4. All of the preceding argument (Appellee's Brief, pp. 12 through 20) is an attempt by appellee to obscure the real issues and is designed to mislead the Court in its determination of this appeal. As has hereinbefore been demonstrated, the principles of law there contended for fly in the face of well-established law pertaining to perjury. The absence of legislation in derogation of this rule of law indicates that it is sound and satisfactory in practice. *Weiler v. United States,* 323 U.S. 608, 610, 65 S.Ct. 548, 550.

This portion of appellee's argument is its only attempt to summarize the evidence. It is interesting to note that the subject of the indictment is further skeletonized as follows: "The subject of the indictment . . . was appellant's sworn testimony that he had not accepted $38,000 from Irving Baskin on behalf of Samish." (Appellee's Brief, p. 21). Appellee gratuitously lends the name of Samish to this statement of the charge while in arguing that the indictment was not duplicitous it summarized count I of the indictment as follows: "The first count alleges in substance that the defendant falsely swore that he had not received $38,000 from Mr. Baskin at a bank in Oakland." This is a direct admission by appellee that the indictment is duplicitous and did not apprise

appellant of the precise nature of the offense with which he was charged.

In summarizing F. W. Whitted's testimony, appellee ignores the facts that this testimony is hearsay insofar as it relates to the meaning of symbols and initials used by Mr. Heller, that Whitted's association with Heller terminated prior to the date of the alleged offense, and that it was Baskin's practice to go to the bank to obtain cash for Mr. Heller which he delivered to Heller at the latter's office. But even ignoring these facts and taking the "established facts" as contended for by appellee, there is not one of these "established facts" that tends to show that appellant went to the bank in Oakland with Baskin and there received $38,000 from him. There is nothing in these "established facts" that is inconsistent with the appellant's innocence of the offense charged.

Appellee distorts the evidence in stating, "Whitted further testified that from the year 1945 *all* settlement of Samish's bets were made with appellant" (Appellee's Brief, p. 21). The strongest inference that can be drawn from Whitted's testimony in this regard is that prior to 1945 he, Mr. Whitted, had made settlements with Mr. Samish and that after 1945 he personally had not participated in settlements of Samish bets but sometimes was present when Heller made settlements of these bets with Arena. This is a far cry from stating that *all* settlements of Samish's bets were made with Arena after 1945. We must remember that Whitted was not associated with Heller after October of 1947 and, therefore, did not have any knowledge whatsoever as to the manner in which the alleged win attributed to Samish on Novem-

ber 30, 1947, of $34,800 was settled or paid, if settled or paid at all.

Giving Mrs. Heller's hearsay testimony that "S.A." meant "Artie Samish Account to James Arena" full credence and effect, we still cannot say that appellant testified falsely when he denied having received $38,000 from Baskin at a bank in Oakland or at any other place. This in effect is the testimony of Baskin which must be corroborated.

Assuming, as contended for by appellee, that a bet was paid *by Heller to James Arena* on behalf of the "S.A." account on October 30, *1946,* (Appellee's Brief, p. 22) appellant fails to see how this assumed fact is in any way inconsistent with the fact that appellant did not receive $38,000 from Baskin at the Oakland bank in December, 1947. Baskin's testimony went to a specific transaction and evidence of other acts which appellee again assumes to be "established facts" in no manner or degree corroborates that direct testimony, a conclusion which both appellant and appellee agree upon (Appellee's Brief, p. 23).

Perhaps the most glaring example of the unwarranted and gratuitous assumptions by appellee occurs at page 20 of its brief wherein it states that the bank teller, Herman Worth, was dead. Counsel for appellant has carefully searched the record for evidence to support this positive statement of fact and can find no foundation for it. Appellee refers to page 187 of the transcript of record, but this was merely the prosecution's argument to the jury, which the government cannot presume to be evidence.

Appellee does not deny that its failure to call a witness whose testimony would elucidate the transaction, gives rise to a presumption that the testimony if produced would be unfavorable. Of course, the same presumption arises upon the government's failure to call Arthur Samish who, like Herman Worth, would be in a position to corroborate Baskin's testimony as to his disposition of the $38,000, if it be true.

Contrary to the assertions of appellee, appellant in his opening brief does make a forthright analysis of of the exhibits and the testimony, and in discussing the evidence he draws every inference favorable to the prosecution (Opening Brief, pp. 36-46). The stellar concession which appellee makes appears at page 24 of appellee's brief as follows: "Baskin's testimony was corroborated in every detail except *one* . . ." And that *ONE* is the very fact at issue, the basis of the perjury charge. From there, appellee suffers a relapse into the fallacious argument that corroboration of a direct witness in perjury cases is analogous to the corroboration required to render an extrajudicial confession or admission admissible in evidence or that degree of corroboration of the prosecutrix's testimony upon which a rape conviction may be sustained. That there is no basis in fact or in logic for such analogy has hereinbefore been demonstrated.

ADMISSIBILITY OF GOVERNMENT EXHIBITS NOS. 2, 3, 4, 6, 7, 9, 10 AND 15.

Appellee did not choose to argue the inadmissibility of Government Exhibits Nos. 9, 10 and 15, therefore appellant will rest upon the authorities cited in his opening brief as to those exhibits.

Appellee asserts that Exhibits Nos. 2, 3, 4, 5, 6, 7 and 8 were identified as Heller's business records and that the handwriting therein contained was Heller's. Appellee also states that "Irving Baskin, F. W. Whitted and Mrs. Heller all testified to the manner in which these books were kept." (Appellee's Brief, p. 25). Appellant agrees that the handwriting in these exhibits was identified as Mr. Heller's. Appellant cannot agree that there is testimony as to the manner in which those business records were kept. Certainly there is no unequivocal expression by any witness that Exhibit No. 3 was a record kept by Mr. Heller in the regular course of his business. As to the other exhibits there was, at best, testimony that Heller had been making entries in books *of that sort,* or *books like this,* or books *of that type.* The foundation laid for the admission of business records in *Harper v. United Sates,* 143 F. 2d 795, cited by appellee, is much different than that in the instant case for in the *Harper* case the witness was auditor and secretary of the company whose records were being offered and he testified that the records were made by him or by bookkeepers under his supervision. Other records involved in the *Harper* case were identified by the custodian thereof as the business records kept in the regular course of business. The case of *Wheeler v. United States,* 211 F. 2d 19, 23, cited by appellee does not sustain appellee's posi-

tion since in that case and in *Landay v. United States,* 108 F. 2d 698, 704, 705, upon which the Court in the *Wheeler* case relies, the custodian of the record or the person who actually made the record testified as to the course of business in which the records were kept and the regularity thereof. *Lewis v. United States,* 38 F. 2d 406, cited by appellee, contains no statement as to what evidence was considered to be sufficient foundation for admission of the business records. There is merely a bald statement, at page 414, that "It was shown that the books produced were the books of account of the company kept for the purpose of recording the business transactions in which the company was involved. This was a sufficient foundation for their introduction *for the purpose for which they were offered.*"

Appellee, in its brief at page 26, makes the bare statement that "It has been universally held that persons familiar with the record may testify as to the meaning of abbreviations used in it." *Meyer v. Everett Pulp and Paper Co.,* 193 F. 857, cited by appellee, holds that *parties to a contract* may explain obscure or ambiguous portions of that contract. The parol evidence rule is there under consideration, while appellant's specifications of error Nos. 5 and 6 raise the objection that certain testimony of F. W. Whitted and Mrs. Heller was hearsay or opinion and conclusion. Likewise, the annotations contained in 100 A.L.R. 1465, cited by appellant, deal only with the parol evidence rule and so have no bearing on the questions presented by this appeal.

Appellee seeks to excuse its failure to lay a proper and sufficient foundation for the admission of Heller's

business records in evidence upon the fact that Mr. Heller was dead (Appellee's Brief, p. 27). Appellee concedes that none of the witnesses were custodians of Heller's records or made or supervised the making of those records. Not one of the witnesses testified that those records were made in the regular course of business. Not one of the government's witnesses could or did testify as to the course of Mr. Heller's business in which any records were kept. These are indispensable elements of a proper foundation upon which business records may be admitted in evidence under Section 1732 of Title 28, U.S.C.A. which explicitly states that such records are admissible as evidence *"if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."* (28 U.S.C.A. 1732.)

See also:

Palmer v. Hoffman, 318 U.S. 109, 115, 63 S.Ct. 477, 481;

Masterson v. Penn. R. Co., 182 F. 2d 793, 797.

INSTRUCTIONS REQUESTED BY APPELLANT.

While considering appellant's specifications of error Nos. 8, 9 and 10, we must bear in mind that the government had the burden of proving, by evidence measuring up to the quantitative rule of evidence applied in perjury cases by the federal Courts, that appellant received $38,000 from Irving Baskin at a bank in Oakland. Ap-

pellee apparently contends that the corroboration is sufficient if it substantiates the testimony of the direct witness in *any regard.* We submit that this is contrary to the law as determined from the cases cited by both appellant and appellee. The corroborating evidence must be clear, direct and positive, and it must be inconsistent with the innocence of the defendant,—it must relate to the falsity of the alleged perjurious testimony.

Appellee asserts that appellant's requested instruction No. 12 demonstrates the admissibility of the evidence to which that instruction was directed (Appellee's Brief, p. 32). This type of argument ignores the fact that this evidence had already been erroneously and irrevocably admitted by the trial Court, and that at that stage of the proceedings it was incumbent upon counsel for appellant to offer instructions which would alleviate the gravity of the error committed in the admission of the evidence complained of in specification of error No. 5.

With relation to specification of error No. 12, contrary to the assertion in appellee's brief, page 32, appellant does not contend that the jury should be instructed "that the corroborative evidence must of itself establish the guilt of the defendant beyond a reasonable doubt," but appellant does assert that the corroborative evidence must "tend to show the perjury independently." It must relate to the *falsity* of the alleged perjurious statement. A bank record which "substantiates the testimony of the witness who has testified directly as to the falsity of the defendant's statement" is not enough since it places the emphasis on the substantiation of the *witness* instead of upon the substantiation of the *falsity of the*

defendant's statement. See argument in appellant's opening brief, pages 72-76.

Dated, San Francisco, California,
June 6, 1955.

Respectfully submitted,
A. J. Zirpoli,
C. Harold Underwood,
Attorneys for Appellant.

No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

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vs.	
UNITED STATES OF AMERICA,	*Appellee.*

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

James Arena, the appellant, respectfully petitions this Court for a rehearing in the above-entitled cause.

We respectfully petition this Court to re-examine its determination of the legal questions presented on our appeal, and in support of this petition represent to this Court as follows:

We reserve our argued position as to each of the points on appeal, and in this petition address ourselves solely to those features of the decision wherein we believe that we may be of further assistance to the Court, and in which

we believe that this Court may be convinced that its result is based upon the application of incorrect legal principles.

The sequence in which our specification of errors is treated in the opinion of the Court will be followed here.

SPECIFICATION OF ERRORS NOS. 2, 3 AND 4.

Errors numbered 2, 3 and 4 relate to the failure of the Court to grant appellant's motion for judgment of acquittal on the first count of the indictment, the insufficiency of the evidence to sustain the verdict of the jury as a matter of law, and the absence of independent evidence to corroborate the direct witness, Baskin, on the fact alleged as falsely sworn, respectively.

(1) We agree with this Court that "As to the nature of the corroboration, no detailed rule seems to have been laid down, nor ought to be laid down." *Arena v. United States,* Opinion p. 8. Corroboration unquestionably can be found in evidence of any nature whether it be documentary, testimonial or demonstrative. In this regard it is no different from any other fact to be proven. It is noteworthy that Mr. Wigmore, in the same section quoted by the Court in its opinion, says, "The rule (requiring corroboration of the testimony of the principal witness) of course applies only to the proof of the *fact alleged as falsely sworn,* and, therefore, a corroboration as to the *act of swearing* and the words sworn is not called for." Wigmore, 3d Ed. Sec. 2042 (Italics those of Mr. Wigmore). Therefore, it is imperative that we look for the *fact to be proven* to determine whether or not the evi-

dence offered as corroboration has probative value, and that in considering these specifications of errors we be not too concerned with the *nature of the evidence offered* as corroborative.

The fact to be proven by corroborative evidence in this instance is set forth at page 4 of this Court's opinion and in substance is that Mr. Baskin delivered $38,000.00 to appellant at a bank in Oakland (See also Appellant's Opening Brief, p. 34).

Appellant's position as to the failure of the government to produce any evidence bearing upon this fact, the fact to be proven, is set forth in Appellant's Opening Brief, pp. 34-50, and will not be repeated herein.

(2) This Court takes the position that the Supreme Court has related the requirement of corroboration in perjury cases to the principle governing corroboration of confessions (Arena v. United States, Opinion p. 9). We respectfully submit that the case of *Warszower v. United States,* 1941, 312 U.S. 342, 347-48, does not establish a singularity of the rules requiring corroboration of confessions and of the direct witness in perjury cases. The only reasonable relation between the two rules is that *some* corroboration is necessary in both types of cases. The matters requiring corroboration and the purposes to be served by the corroboration in each case is patently different. This is best demonstrated by again referring to the fact which is to be proven by the corroborative evidence in each of the cases.

In confession cases the corroborative evidence must concern the corpus delicti only insofar as it concerns

proof of the injury or loss through the criminality of *someone*. For example, proof of a confession in a murder case must be preceded by other evidence of death by unnatural causes. The corroborative evidence in these cases need not touch the identity of the wrongdoer.

> "(1) * * * for the contrast between the first and the other elements [of the corpus delicti] is what is emphasized by rule, *i.e.* it warns us to be cautious in convicting (upon confession alone), since it may subsequently appear that no one has sustained any loss at all; for example, a man has disappeared, but perhaps he may later reappear alive. To find that he is in truth dead, yet not by criminal violence, *i.e.* to find the second element (somebody's criminality) lacking, is not the discovery against which the rule is designed to warn us.
>
> "(2) * * *
>
> "(3) A third view, indeed, too absurd to argue with, has occasionally been advanced, at least by counsel, namely that the corpus delicti includes the third element also, *i.e.* the *accused's identity* or agency as the criminal. *By this view the term corpus delicti would be synonymous with the whole of the charge, and the rule would require that the whole be evidenced by all three elements independently of the confession, which would be absurd.*" (Italics supplied.)
>
> *Wigmore* 3d Ed. Sec. 2072.

Counsel for appellant have been unable to find any reference, judicial or otherwise, to a requirement in confession cases that any one or all of the elements of the crime charged must be supported by evidence from at least *two independent sources*. Such is not the rule

in confession cases. The nature of the corroboration required in confession cases was succinctly stated in *D'Aquino v. United States,* 172 F. 2d 338, at p. 357 as follows:

> "* * * It is sufficient if the corroborative evidence, when considered in connection with the confession or admission, satisfies the jury beyond a reasonable doubt *that the offense was in fact committed.* * * *" (Italics supplied.)

The italicized portion of the Court's quotation from the opinion in *Opper v. United States,* 1954, 348 U.S. 84, 92, 93 (Arena v. United States, Opinion p. 9), which relates to admissions of the accused, goes no further than to say that there must be evidence other than the admission to establish that a crime had in fact been committed.

A careful analysis of the cases cited in this Court's opinion (Arena v. United States, pp. 9 and 10) reveals that the rule requiring corroboration in confession and admission cases is a requirement that there must be evidence that a crime had in fact been committed before an admission or confession may be considered by the jury. *It is not a requirement that there must be independent evidence of the identity of the perpetrator of the crime.*

In perjury cases the fact to be proven is the falsity of the defendant's oath as charged in the indictment. Falsity is the corpus delicti in perjury cases. *Hammer v. United States,* 271 U.S. 620, 629, 46 S.Ct. 603. In accordance with the standard set forth by the Supreme Court of the United States that fact (the corpus delicti) must be proven by the testimony of two independent witnesses or

one witness and corroborating circumstances. *Weiler v. United States,* 1945, 323 U.S. 606, 65 S. Ct. 548; *United States v. Neff,* 3 Cir., 1954, 212 F. 2d 297, 306. The corroboration must be such that it supplies independent proof of facts inconsistent with the innocence of the accused. *United States v. Hiss,* 2 Cir., 185 F. 2d 822, 824; *United States v. Isaacson,* 2 Cir., 59 F. 2d 966, 968; *United States v. Buckner,* 2 Cir., 118 F. 2d 468, 469; *United States v. Neff,* supra.

It is thus clear that in perjury cases there must be at least two independent sources of evidence which bear upon the fact in issue—the *falsity* of the defendant's statement under oath. This is a substantive rule of law defining the *burden of proof* in perjury cases. The rule as applied in confession and admission cases is a rule governing the *admissibility* of confession and admission in evidence, in the first instance, and does not require that this evidence come from sources independent from that source from which the evidence of an admission or confession is produced. Conceivably and quite probably it has occurred that one single witness has supplied testimony in proof that a crime had in fact been committed and then, upon that foundation (proof of the corpus delicti), this same witness has been permitted to testify as to the fact that he apprehended the accused who at that time made admissions or confessed his guilt to the witness. Surely in this situation it cannot be contended that there is corroboration of the testimony of the single witness, yet the law generally does not require evidence from more than one source upon which a conviction may be had, for example, in the crime of robbery. This is not

true in perjury cases. There must be at least one witness and corroborating circumstances inconsistent with the innocence of the accused to sustain a conviction for perjury.

United States v. Neff, supra.

The error of the Court in relating corroboration in perjury cases to corroboration in confession and admission cases is further pointed up by the opinion in *Pawley v. United States,* 1931, 47 F. 2d 1024, in which Judge Sawtelle participated, which holds that the general rule in prosecutions for perjury has no application where "the appellant expressly admitted upon the trial that the testimony assigned as perjury in the third count was false." This case clearly demonstrates that the term "corroboration" is being used in two entirely distinct and unrelated imports in perjury cases and in confession and admission cases.

The opinion of this Court in the instant case is the first instance to which our attention has been directed in which the Court in effect declares that the corroborating evidence as to the falsity of the defendant's oath need not be independent evidence. This requirement of corroboration by independent evidence the Supreme Court refused to reject in *Weiler v. United States,* supra. Nor has the second circuit, nor the third circuit, nor this circuit heretofore recognized the "cognation" between corroboration in confession cases and in perjury prosecutions to be such as to dispense with the rule that *the corroborating evidence of the falsity of the defendant's oath* must be independent evidence.

While this Court in its opinion makes reference in a footnote, page 11 thereof, to the case of *United States v. Neff,* supra, no effort is made therein to distinguish or in any way reconcile that case with the opinion in the instant case. Appellant is of the firm conviction that the two cases express completely different principles of law and any attorney reading these cases for guidance in a perjury prosecution could not help but become completely confused.

We therefore, respectfully urge that, in order to resolve the conflict between the law applied in this case and the law applied in perjury cases in courts of appeal of this and other circuits and in the Supreme Court of the United States, and to rectify the error committed in affirming the judgment of the trial Court as to specification of errors numbered 2, 3, and 4, this petition for rehearing should be granted.

SPECIFICATION OF ERROR NO. 7.

Appellant very earnestly contends that it is not the intent of Title 28 U.S.C.A., Section 1732(a), which governs the admission of business records, to obviate the necessity for any foundation which would lend truthworthiness to such business records. Such is the effect of this Court's opinion. This is particularly true of Exhibit No. 3, which was admitted by the trial Court merely as an exemplar and not for the probative value of its contents. Mr. Heller was responsible only to himself. Only he had an interest in keeping his records in the manner in which they were kept, whether right or wrong. It is significant that not

one of the witnesses testified that Exhibit No. 3 was the very book which Mr. Heller had kept. There is absolutely no testimony that Mr. Heller made the record in November, 1947. Only Mrs. Heller testified that she "saw most of this record" (R. p. 135). There is not one iota of evidence remotely tending to connect that record with the incidents recorded therein as to the time of occurrence. We respectfully submit that this foundation is insufficient upon which this record could be admitted in evidence as a business record under said Section 1732(a) of Title 28 U.S.C.A., and we repeat for remembrance that it was admitted only as an exemplar. On this latter fact the Court in its opinion did not choose to comment. It seems most obvious to appellant that the trial judge, who observed the witnesses and the exhibits, felt that as to Exhibit No. 3 and, for that matter, exhibits numbered 2, 4, 5, 6, 7 and 8, nothing more had been established than that these exhibits were in the handwriting of Mr. Heller.

We respectfully submit that the identification of handwriting in a document is insufficient foundation upon which a document may be admitted in evidence against a stranger thereto under Section 1732(a) of Title 28 U.S.C.A.

SPECIFICATION OF ERROR NO. 6.

In rejecting appellant's contention that the trial Court erred in permitting Mrs. Heller to testify as to the meaning of initials, figures, dates and symbols contained in exhibits numbered 2, 3, 4, 5, 6, 7 and 8, this Court

declares that persons *familiar* with given *types of documents* may testify as to the meaning of symbols and abbreviations used in such documents. MRS. HELLER'S TESTIMONY REFLECTS AN UTTER LACK OF FAMILIARITY WITH THE CONTENTS OF THESE RECORDS (R. pp. 135, 155-157).

There is a definite distinction in testimony which makes a record of a business transaction admissible when the foundation therefor has been laid and the permitting of a witness to testify thereafter as to the meaning of the contents of the record, where he has *no personal knowledge* of the transaction therein reflected. Neither *Wheeler v. United States,* 211 F. 2d 19, 23, nor *Meyer v. Everett Pulp & Paper Co.,* 193 F. 857, 862, cited by the Court in its opinion goes this far. For our analysis of these two cases see our closing brief, pages 17 and 18. For the correct view, see *Southern Ry. Co. v. Mooresville Cotton Mills,* 4 Cir., 187 F. 72, 73.

We cannot be too strenuous in urging the Court to reconsider appellant's specification of error No. 6 in the light of Mrs. Heller's testimony above referred to, which shows a lack of familiarity with or personal knowledge of the contents of the records and particularly of Exhibit No. 3.

SPECIFICATION OF ERROR NO. 5.

This Court makes the broad statement that "* * * Whitted * * * testified regarding the manner in which Heller's books were kept. * * *" (Arena v. United States, Opinion p. 14.) With this we cannot agree, certainly with

respect to exhibits numbered 2, 3, 4, 5, 6, 7 and 8 and the most that can be gleaned from Whitted's testimony in this regard is that he was personally acquainted with Mr. Heller's method of recording parlay bets (R. pp. 112, 113). There is no evidence whatsoever from which it can be concluded that Whitted had personal knowledge of the contents of any other of Heller's physical records which would qualify him to testify as to the meaning of their contents.

SPECIFICATION OF ERROR NO. 1.

Counsel for appellant apologize to the Court for permitting a clerical error to appear in the reply brief for appellant wherein at page 5 it is stated that count I of the indictment herein sets forth *four* such separate offenses (Italics supplied). Consistent with appellant's contention in his opening brief, at page 30, the statement was intended to read, "* * * that Count I of the indictment herein sets forth five such separate offenses."

Appellant respectfully submits that the cases of *Cornes v. United States,* 9 Cir., 1941, 119 F. 2d. 127, 129, and *Greenbaum v. United States,* 9 Cir., 80 F. 2d. 113, 116 cited in the Court's opinion at page 14 have no application and should be distinguished from an indictment in any perjury case for the reason that the only act of the accused which need be set forth is the precise statement which is alleged to be false, and for the further reason that the offense of perjury is complete each time that a witness under oath swears falsely to any distinct, separate and material matter as to which he is examined. Of

necessity indictments under Section 338 of Title 18 U.S.C.A., as involved in the *Cornes* and *Greenbaum* cases (supra), must set forth a certain minimum of detail as to how the *fraudulent scheme was executed.* Such is not the requirement in indictments for perjury.

SPECIFICATION OF ERRORS NOS. 8, 9, 10, 11 AND 12.

Appellant does not contend that the corroborating evidence must be of a certain kind or type; however, appellant does insist that the corroborating evidence must bear directly and positively upon the alleged falsity of the statement made under oath consistent with the declaration of this Court in *Radomsky v. United States,* 9 Cir., 180 F. 2d. 781, 782, referred to in our Opening Brief at page 67. Likewise, appellant insists that the corroborating evidence must be inconsistent with his innocence—that is, it must bear directly upon the subject matter of the statement which is alleged to be false and it must be inconsistent therewith.

We respectfully submit that the charge of the trial Court on the subject of corroboration (Arena v. United States, Opinion, pp. 16 and 17) inevitably led the jury to their deliberations with the understanding that the direct witness need be corroborated only as to collateral matters to which he testified. This clearly is not the law. This error so prejudiced the appellant as to deny him a fair trial on the principal issue of fact which was submitted to the jury for its determination.

CONCLUSION.

It is respectfully submitted that this petition for rehearing be granted.

Dated, San Francisco, California,
October 26, 1955.

A. J. Zirpoli,
C. Harold Underwood,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
October 26, 1955.

A. J. Zirpoli,
Of Counsel for Appellant and Petitioner.

No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

BRIEF FOR APPELLANT.

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IN THE

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Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

This Court has jurisdiction of this case under Sections 2243 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellee petitioned for a writ of habeas corpus releasing him from the custody of appellant on April 20, 1954 (Tr. 8). His petition was on the grounds that his draft board had denied him procedural due

process of law in classifying him I-A-O and, therefore, his induction into the armed forces was unlawful (Tr. 3-8). United States District Judge George B. Harris issued an order to show cause why a writ of habeas corpus should not issue on April 21, 1954 (Tr. 8-9). On June 18, 1954 Judge Harris issued an order granting the petition for a writ of habeas corpus (Tr. 9-10). On June 24, 1954 Judge Harris issued the writ (Tr. 12). Appeal was then made to this Court from the order, judgment and decree of the Court issuing a writ of habeas corpus (Tr. 12-13).

FACTS.

Appellee's Selective Service file, which is Petitioner's Exhibit No. 1, reveals that appellee registered for Selective Service on November 6, 1950. Appellee stated in his Special Form for Conscientious Objector that he was a member of the American Lutheran church, and said that sound reasoning and logical philosophy was the basis for his judgments with reference to conscientious objection (File 11-12). Appellee was classified I-A-O on January 22, 1952 (File 9).

Subsequently, appellee wrote two letters to the Local Board. One letter, which was apparently written February 1, 1952 and received by the Board on February 5, 1952 complained of the I-A-O classification (File 66). It began "I request *an appeal* of my classification." The last sentence of this letter reads "Please, carefully reconsider your classification. I

can ask of you nothing more." (File 67). The other letter, which was apparently written January 26, 1952 and received February 7, 1952, asks, among other things, "* * * your order for physical examination leads me to question how I have been classified, if at all, or if, through some unfortunate clerical error or misinterpretation, my being so ordered is a mistake." (File 62). At page 63 of the file, in the next to the last paragraph of his letter, referring to his conscientious objection, appellee states "I would also like to know how I, as a student, stand with your board, disregarding my conscientious objections." This letter was received by the Local Board two days after the first letter above referred to which requested an "appeal" and the Local Board to "reconsider your classification." Also, on February 7, 1952 the Local Board received a letter from the Director of Deep Springs College certifying that Mr. LaRose was enrolled at Deep Springs College as a full time student (File 61).

On March 20, 1952 the Local Board was sent SSS Form 109, College Student Certificate, by Deep Springs College (File 53). On April 22, 1952 appellee's classification was reopened by the Local Board, and he was reclassified from Class I-A-O to Class II-S (File 9).

On September 13, 1952 the Local Board was advised by the Director of Deep Springs College that appellee was no longer enrolled at the college (File 45). On September 23, 1952 appellee was reclassified to Class I-A-O (File 9). No appeal was taken from this classification.

Appellee was then ordered to report for induction on February 13, 1953 (File 9). After being inducted into the army (Tr. 45), appellee deserted (Tr. 48) and, after being apprehended, was transferred to the Presidio of San Francisco (Tr. 48). He then petitioned for a writ of habeas corpus (Tr. 3). It is the appeal from the issuance of a writ of habeas corpus issued pursuant to this petition that is presently before this Court.

REGULATIONS.

Selective Service Regulation 1623.2

1623.2 *Consideration of Classes.*—Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class:		Class:	
I-A-O		IV-A	
I-O		IV-B	
I-S		IV-C	
II-A		IV-D	
II-C		IV-F	
II-S		V-A	
I-D		I-W	
III-A		I-C	

Selective Service Regulation 1625.1

1625.1 *Classification Not Permanent.*—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

Selective Service Regulation 1625.2

1625.2 *When Registrant's Classification May be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification * * *

SPECIFICATIONS OF ERROR.

Appellant specified as error the following:

1. The Court erred in holding that a letter filed with a Local Draft Board appealing a classification deprives the Board of all jurisdiction over the registrant.

2. The Court erred in holding that the granting of a II-S classification without holding a hearing on a claim of a I-O classification was a denial of due process of law.

3. The Court erred in holding that petitioner was entitled to a writ of habeas corpus on the grounds that he was denied a right of appeal where the classification under which petitioner was inducted was not appealed.

QUESTIONS PRESENTED.

I. Did appellee exhaust his administrative remedies?

II. Was appellee deprived of due process of law?

SUMMARY OF ARGUMENT.

I. APPELLEE HAS NOT EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

Appellee was inducted by virtue of a I-A-O classification to which he was reclassified on September 23, 1952. At the trial below he claimed that the classification of II-S received on April 22, 1952 was invalid

because the Local Board had no power to reopen his case at that time. Appellee did not appeal from the September 23 I-A-O classification. He, therefore, did not exhaust his administrative remedies and has no standing to petition for habeas corpus. Furthermore, his claimed error does not apply to the classification under which he was actually inducted. It cannot be said that an invalidity in a prior classification carries over to a new classification by a Selective Service Board since this result would allow error once made to furnish complete exemption from service in the armed forces. Since the classification of I-A-O finally given by the Board is valid, the District Court erred in granting a writ of habeas corpus.

II. APPELLEE WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

Appellee wrote two letters to his local draft board. In one he used the word "appeal" but ended "Please, carefully reconsider your classification. I can ask of you nothing more." In the other letter he requested consideration as a student. The Second Circuit in *United States v. Vincelli,* 215 F. 2d 210, has held considering an analogous letter as a request for an appeal was improper. If the result in the present case is allowed to stand, the Selective Service System is on the horns of a dilemma for no matter which way they interpret letters like appellee's the registrant may claim his classification has been invalidated. In the present case the material in the file fairly indi-

cates a desire on the part of appellee to have the Board reconsider and reclassify him. The Selective Service Board gave him exactly what he asked for. He was not prejudiced through the lack of an appeal. The Local Board under Regulation 1623.2 was required to classify appellee in the lowest classification to which he was entitled. Since II-S was a lower classification than I-O, it would have been an idle act to hold a conscientious objector hearing at that time. Such a requirement is not required by law and would create an unnecessary administrative burden.

ARGUMENT.

I. APPELLEE HAS NOT EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

Appellee, in the Court below, attacked his classification of II-S by the Local Board on the ground that the Local Board had no jurisdiction to act after appellee had written the Board a letter in which he requested what he termed an appeal. Appellee, however, was not inducted into the army by virtue of this classification. The classification under which he was inducted was that of I-A-O to which he was reclassified on September 23, 1952 (File 9). He received this classification more than five months after the II-S classification which he attacked (File 9). No appeal was taken by appellee from either the II-S classification or the I-A-O classification which finally resulted in his induction.

Before any judicial review may be had in a Selective Service case, the registrant must complete the administrative procedure which has been provided under the Universal Military Training and Service Act of 1948. *Mason v. United States* (9th Cir.), No. 14,286; *Williams v. United States* (9th Cir.), 203 F. 2d 85, 88; *Falbo v. United States,* 320 U.S. 549, 554; *Estep v. United States,* 327 U.S. 114.

If, in fact, LaRose was injured by the action of the Local Board reopening and reclassifying him instead of forwarding his file to the Appeal Board, that injury could have been cured by an appeal following his I-A-O classification.

Under a somewhat similar set of facts, this Court has recently held (*Skinner v. United States* (9th Cir.), 215 F. 2d 767) that objections which may have had merit on appeal were waived by a failure to appeal. In that case also there was a classification making the registrant liable for service followed by a change of classification and thereafter a reclassification not appealed which formed the basis of the registrant's induction. Assuming, but not conceding, that the Local Board erroneously reopened LaRose's classification, nevertheless that error, if any, could have been cured if LaRose had appealed the classification under which he was inducted.

Let us assume that the Local Board, upon reopening appellee's classification on April 22, 1952, had classified him I-A instead of the II-S classification he actually received. Appellee, when he petitioned for a writ of habeas corpus, would then be bringing into

question the validity of the classification under which he was inducted. However, that is not the case here. LaRose is not questioning the classification given to him by the Local Board on April 22, 1952 but is in fact questioning the classification given him by the Board some five months later on September 23. Admittedly, appellee did not appeal from this classification.

Since appellee did not appeal from the classification under which he was inducted, he has no standing to question the procedure of the Board. *Skinner v. United States, supra.*

Appellee was classified I-A-O by the Selective Service Board on September 23, 1952. No question was raised in the Court below concerning the basis in fact for this classification. It is apparent that the Local Board could properly have so classified him. (Appellee indicated at pages 11 and 12 of his file that he was a member of the Lutheran Church and that reasoning and logical philosophy were the basis for his objections to conscientious objection. From a study of the whole file the Local Board could have concluded that LaRose's proper classification was I-A-O.) It was this classification that resulted in LaRose's induction. If there was procedural error in classifying him II-S, that error was removed when the Board reopened the classification on September 23. At that time a new classification was given which appellee had an opportunity to question if he so desired. This classification was supported by material in the file. Appellee has not claimed that this classi-

fication was arrived at improperly. When appellee was no longer attending school he was no longer entitled to a II-S classification.

The regulations provide that no classification is permanent. *Selective Service Regulation 1625.1.* When a change in status resulted the Board was under a duty to reclassify the registrant. *Tyrell v. United States* (9th Cir.), 200 F. 2d 8, 11, 12. It cannot be said that any error committed at any time under prior classifications by a local board so invalidates the classification procedure that a registrant may never be called to military service.

Holding the classification of September 23, 1952 invalid infers that a taint was carried over from the classification of April 22, 1952. Such a result could not have been the intention of Congress since, for all practical purposes, an error once made would then furnish complete exemption from service in the armed forces. This Court has in analogous cases denied such a construction of the law. *Cramer v. France* (9th Cir.), 148 F. 2d 801; *Tyrell v. United States,* supra.

II. APPELLEE WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

Appellee wrote two letters to his Local Board in late January and early February of 1952 (File 61, 62, 63, 66, 67). These letters were apparently received by the Local Board in reverse order from the sequence in which he wrote them. The letter first received by the Board began "I request *an appeal* of my classi-

fication" but ended "Please, carefully reconsider your classification. I can ask of you nothing more." (File 66, 67). It is this letter that the District Court feels constituted a request for an appeal, the denial of which deprived appellee of due process of law.

This letter is more or less ambiguous. It could be considered as a request for an appeal. On the other hand, it could be considered as a request to reopen under Regulation 1625.2(1). The Second Circuit in *United States v. Vincelli,* 215 F. 2d 210, has recently held that a letter starting "I hereby appeal my I-A classification for above mentioned reasons" was a request for a reconsideration, and held it was a denial of due process to consider it an appeal instead of reopening the registrant's classification. The Selective Service System is presently on the horns of a dilemma. If they consider such letters as written by LaRose as requests for appeals, the classification is subject to attack under *United States v. Vincelli,* supra. If they consider it as a request to reopen, the classification is subject to attack on the basis of the decision of the Court below. The letter in the instant case seems to request reopening under the regulation above cited even more vigorously than in the *Vincelli* case. How can a board receive any more direct request than "Please, carefully *reconsider* your classification. I can ask of you nothing more." (Italics supplied.)

Furthermore, the Local Board received on February 7, 1952, two days after the letter above referred

to, another letter which questioned his classification and requested advice in this matter. "I would also like to know how I, as a student, stand with your board, disregarding my conscientious objections." Also on that same day the Local Board received a letter from the Director of Deep Springs College certifying that appellee was enrolled at that college as a full time student (File 61). The Board under Regulation 1625.2(2), on its own motion, could reopen the classification if it received facts not previously considered when the registrant was classified. The college student certificate received March 20 certainly justified such action by the Board (File 53). The Local Board, when supplied with this new information and after receiving a letter asking it to reconsider its classification, was justified, if it was not compelled to reopen and reconsider appellee's classification. See *Brown v. United States* (9th Cir.), 216 F. 2d 258, 269.

Appellee received exactly what he asked for. He requested the Local Board to give him consideration as a student (File 63). The Local Board gave him that classification. This Court has held that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox v. United States* (9th Cir.), 200 F. 2d 398, 401. See also *Tyrell v. United States,* supra; *Martin v. United States*, 190 F. 2d 775.

It cannot be said that the lacking of an appeal in this case prejudiced LaRose in any manner. The administrative body was required under its regula-

tions to classify him in the lowest classification to which he was entitled. *Selective Service Regulation 1623.2.* Under this regulation, since material appeared in the file showing that LaRose was a full time college student, his proper classification was II-S and the Local Board or the Appeal Board could not properly classify him I-O as he requested. Holding a hearing on his conscientious objection would at that time have been an idle act. If and when the registrant was reclassified other than II-S, the time would come for holding a conscientious objector hearing. That time arrived in LaRose's case on September 23, 1952. LaRose, however, did not at that time request a hearing or an appeal. The finding of the Court below with respect to the necessity for a conscientious objector hearing at the time of the II-S classification has no support in the regulations or statutes. Such a requirement does not seem proper. The classification should be made with respect to the conditions at the time.

The duty of local draft boards to classify and reclassify registrants is one of continual recurrence. *Tyrell v. United States,* supra, page 11. It is incumbent upon the local board to survey its personnel and examine its files in light of world conditions. *Tyrell v. United States,* supra, page 12. In the *Tyrell* case this Court held that it was proper for the Selective Service Board to reconsider a conscientious objector case when a change in conditions occurred.

It cannot be said that the Board was required to give consideration to a I-O classification when the

registrant was entitled to a deferred classification lower on the scale. See Selective Service Regulation 1623.2. If the registrant was IV-F or I-C or some other classification, it cannot be said that it is the duty of the Board to hold a hearing with respect to all other classifications to which the registrant might conceivably be entitled. If, for example, LaRose was over age and classified V-A, the Local Board should not be required to inquire into his conscientious objector status. Such a requirement would create an unnecessary administrative burden and is not required by law.

CONCLUSION.

Appellee failed to exhaust his administrative remedies and, the District Court should not have exercised jurisdictional review in his case. But, assuming but not conceding, that some jurisdictional review could be had, the District Court did not correctly decide the present case. The Court issued a writ of habeas corpus despite the fact that the classification under which appellee was inducted was not ever under attack. Its decision requiring an appeal is in conflict with the decisions of other Courts. Furthermore, the Court found a deprivation of due process of law in a case where the registrant could not conceivably have been prejudiced and, in fact, received exactly what he asked for. The writ of habeas corpus heretofore issued in the above-entitled case should be dis-

charged and appellee returned to the custody of appellant.

Dated, San Francisco, California,
January 12, 1955.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellant.

No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,517

IN THE

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Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction of this case under Sections 2243 and 2253 of Title 28, United States Code.

STATEMENT OF THE CASE.

Appellee petitioned for a writ of habeas corpus to release him from the custody of appellant on April 20, 1954 (Tr. 3-8). His petition was on the grounds that he was wrongfully and unlawfully detained and

imprisoned at Fort Scott, Presidio of San Francisco, California, in custody of appellant, and that he was unlawfully inducted into the armed forces in violation of his rights under the provisions of the Universal Military Training and Service Act and the regulations thereunder. United States District Judge George B. Harris issued an order to show cause why a writ of habeas corpus should not issue on April 21, 1954 (Tr. 8-9). A full hearing was had in the matter on May 7 and May 13, 1954 (Tr. 15-88). On June 18, 1954 Judge Harris issued an order granting the petition for writ (Tr. 9-10). On June 24, 1954 Judge Harris issued the writ (Tr. 12). Appeal was then made to this Court from the order, judgment and decree of the Court issuing the writ (Tr. 12-13).

FACTS.

At the time petition was filed appellee was a member of the Army, having been inducted in February, 1953. He was ordered inducted after having been theretofore classified as a I-A-O (conscientious objectors not opposed to non-combatant training and service). He repeatedly protested his classification and induction and on two occasions deserted the Army post to which he was assigned.

The entire draft file is in the record as Exhibit I and reveals that on January 22, 1952 appellee was classified I-A-O. On January 22, 1952, the same date as he was classified and before notice of classification,

appellee was ordered to report for Armed Forces physical examination on January 28, 1952. On January 26, 1952 appellee directed a letter to his draft board in which he advised he had had no notice of his classification but stated he could not appear for his physical examination until February 1, 1952, for reasons stated in his letter (Tr. 19). On January 28, 1952 appellee was advised he had failed to appear for physical examination and unless the board was contacted immediately the matter would be referred to the F.B.I. (Tr. 21).

On February 1, 1952, and within ten days after his classification, appellee wrote a letter to his board in which he stated in unequivocal language: "I request an appeal of my classification. I received my notice of classification two days ago. It stated that I had been classified I-A-O" (Tr. 21). He was not given an appeal or even a personal hearing by the board. On July 23, 1952 appellee was classified 2-S (Students' deferment), with a provision that it was to expire in June, 1953. On September 23, 1952 the local board changed his classification to I-A-O. Within two days thereafter appellee went in person to his local board to protest his classification but was told there was nothing further they could do and he was referred to the Appeal Board (Tr. 61-62). Still within ten days from his last classification, he went to the Appeal Board (Tr. 62) and was again advised his case was closed. Without being given a right to a personal appearance, before the local board, or an appeal for which he made a timely request, appellee was inducted.

"Section 1624.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended."

"Section 1624.3 *Induction postponed.* A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board, as provided in Section 1624.2(d)."

"Section 1626.2 *Appeal by registrant and others.* (a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition.

"(b) . . .

"(c) . . .

"(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110)."

"Section 1626.13 *Local board to prepare appeal record and forward file.* (a) Immediately upon an appeal being taken to the appeal board by a person entitled to appeal, the local board shall prepare the Individual Appeal Record (SSS Form No. 120) in duplicate, attaching the original to the inside of the registrant's Cover Sheet (SSS Form No. 101) and placing the duplicate copy in the local board files . . . "

"Section 1626.14 *Time when record to be forwarded on appeal.* The registrant's file shall be forwarded to the appeal board, or appropriate panel thereof, immediately after the local board has complied with the provisions of Section 1626.13, but in no event later than five days after the appeal is taken. The local board shall enter in the Classification Record (SSS Form No. 102) the date it transmits the registrant's file to the appeal board or appropriate panel thereof."

"Section 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) . . .

(2) . . .

(3) . . .

(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice."

"Section 1626.41 *Appeal postpones induction.* A registrant shall not be inducted either during the period afforded him to take an appeal to the appeal board or during the time such an appeal is pending."

QUESTIONS PRESENTED.

I. Did the local board fail to grant appellee a right to a personal appearance before it, in violation of Section 1624.1 of the regulations?

II. Did the local board fail to grant appellee a right to appeal his classification, in violation of Sections 1626.2, 1626.13, and 1626.14 of the regulations?

III. Did the local board and appeal board by thus refusing his right to appeal fail to grant appellee a right to a hearing before a hearing officer appointed by the Department of Justice, in violation of Section 1626.25, since his classification involved a claim that he was a conscientious objector?

IV. Did the local board violate Section 1626.41 of the regulations, since it required that appellee be inducted during the time an appeal of his classification was pending?

SUMMARY OF ARGUMENT.

I.

Did the local board fail to grant appellee a right to a personal appearance before it, in violation of Section 1624.1 of the regulations?

Section 1624.1 specifically provides that a registrant must be given a right to a personal appearance before the local board if he files a written request therefor within ten days after he has been notified of his classification. On January 22, 1952 he was classified. On January 26, 1952 he wrote the local board expressing dissatisfaction with his classification (Tr. 19-20). On February 1, 1952 he again wrote requesting an appeal (Tr. 21-22). Either or both of these letters should have been considered by the local board as a request for a personal appearance. See *Berman v. Craig,* 207 Fed. 2d 888.

II.

Did the local board fail to grant appellee a right to appeal his classification, in violation of Sections 1626.2, 1626.13 and 1626.14 of the regulations?

The regulations cited in the caption have reference to the method by which an appeal may be had by a registrant dissatisfied with his classification. Since the local board failed to accord appellee his right to

appeal which was properly and timely requested by appellee in his letter dated February 1, 1952 (Tr. 21-22), his classification was invalid and his induction and retention illegal.

Cox v. Wedemeyer, 192 Fed. 2d 920;
Knox v. United States, 200 Fed. 2d 398;
United States v. Stiles, 169 Fed. 2d 455;
United States v. Craig, 207 Fed. 2d 888;
Tung v. United States, 142 Fed. 2d 919;
United States v. Laier, 52 Fed. Supp. 392;
United States v. Peterson, 53 Fed. Supp. 760.

III.

Did the local board and appeal board by thus refusing his right to appeal, fail to grant appellee a right to a hearing before a hearing officer appointed by the Department of Justice, in violation of Section 1626.25, since his classification involved a claim that he was a conscientious objector?

The proper classification of appellee involved the question of whether he was a conscientious objector. As such he was entitled not only to an appeal but to a hearing before a hearing officer designated by the Department of Justice. The failure of the local board to grant him an appeal denied appellee of this substantial right. See Section 1626.25 Selective Service Regulations.

IV.

Did the local board violate Section 1626.41 of the regulations, since it required that appellee be inducted during the time an appeal of his classification was pending?

Section 1624.3 provides registrant shall not be inducted until ten days after his personal appearance. Section 1626.41 provides that registrant shall not be inducted during the time an appeal is pending and an appeal is taken by filing a written request therefor. Since the appeal in appellee's case had properly been taken it must be considered pending until acted upon. Thus appellee was inducted in violation of these two sections.

United States v. Stiles, 169 Fed. 2d 455.
Knox v. United States, 200 Fed. 2d 398.
Cox v. Wedemeyer, 192 Fed. 2d 920.

ARGUMENT.

I.

DID THE LOCAL BOARD FAIL TO GRANT APPELLEE A RIGHT TO A PERSONAL APPEARANCE BEFORE IT, IN VIOLATION OF SECTION 1624.1 OF THE REGULATIONS?

As the facts disclose on January 22, 1952 appellee was classified I-A-O, that is, a conscientious objector who was found not opposed to non-combatant training and service. Although no notice of classification had been received by appellee, he did receive a letter on or about January 26, 1952 ordering him to report for physical examination on January 28, 1952. Appellee immediately on said January 26, 1952 wrote a letter (Tr. 19) stating: "This afternoon I received your order for me to report . . ." He explained he had not received his classification, did not know what it was and explained why he could not be ex-

amined on January 28th but offered to go on February 1st. He explained he was attending a school 50 miles away from the nearest local board. On February 1, 1952 appellee disclosed that for the first time he had been notified of his classification and then and there objected to his classification (Tr. 21-22). His file disclosed that he was unalterably opposed to military training and service in any form.

As was stated in *Craig v. United States,* supra: "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."

The two letters to the local board dated January 26, 1952 and February 1, 1952 disclose an unquestionable desire on the part of appellee to get a review of the classification. The regulations outline the procedural rights of the registrant and require under these circumstances that appellee was entitled to the opportunity to appear in person. This opportunity was not given appellee and he was therefore deprived of a substantial right.

United States v. Laier, 52 Fed. Supp. 392;
United States v. Peterson, 53 Fed. Supp. 760;
Knox v. United States, 200 Fed. 2d 398;
Cox v. Wedemeyer, 192 Fed. 2d 920;
Niznick v. United States, 173 Fed. 2d 328;
United States v. Zieber, 161 Fed. 2d 90;
Reel v. Badt, 141 Fed. 2d 845;
United States v. Craig, 207 Fed. 2d 888;
Davis v. United States, 199 Fed. 2d 689;
Tung v. United States, 142 Fed. 2d 919.

II.

DID THE LOCAL BOARD FAIL TO GRANT APPELLEE A RIGHT TO APPEAL HIS CLASSIFICATION, IN VIOLATION OF SECTIONS 1626.2, 1626.13 AND 1626.14 OF THE REGULATIONS?

The letter dated February 1, 1952 stated as follows: *"I request an appeal of my classification.* I received my notice of classification two days ago. It stated that I had been classified I-A-O. If you recall my conscientious objector application, this is not the classification I desire, and not the classification I will be satisfied with." (Italics ours.)

What more precise, unequivocal language could a registrant use to impress upon a local draft board that he was thereby appealing from the I-A-O classification. With all due respect to this Court, if this notice of appeal were written by a judge it could not have been more concise and to the point. Yet the local board disregarded the request and failed to prepare an appeal record as required by Section 1626.13 or forward the file to the appeal board within five days, as required by Section 1623.14 of the regulations. Instead it directly violated Section 1626.41 by ordering appellee inducted before this appeal properly taken by appellee was determined.

The citation of cases referred to under Point I is equally applicable here and is specifically referred to.

III.

DID THE LOCAL BOARD AND APPEAL BOARD BY THUS REFUSING HIS RIGHT TO APPEAL, FAIL TO GRANT APPELLEE A RIGHT TO A HEARING BEFORE A HEARING OFFICER APPOINTED BY THE DEPARTMENT OF JUSTICE, IN VIOLATION OF SECTION 1626.25, SINCE HIS CLASSIFICATION INVOLVED A CLAIM THAT HE WAS A CONSCIENTIOUS OBJECTOR?

Under the provisions of Section 1626.25 where the appealed from classification involved the question of conscientious objector the appellee was entitled to a hearing by a hearing officer designated by the Department of Justice. It is true that such determination is purely advisory and not binding upon the appeal board but it has been repeatedly held that failure to accord the right to such a hearing was a violation of due process.

> "Furthermore, under the rule stated in the case of *Sterrett v. United States,* supra, and *Triff v. United States* (No. 13,952, decided with *Sterrett v. United States*) registrant was refused the hearing by the Department of Justice which the statute required. Upon the authority of these two cases the judgment here cannot stand.
>
> Reversed."
>
> *Blevins v. United States,* No. 14,189. Decided November 26, 1954.

IV.

DID THE LOCAL BOARD VIOLATE SECTION 1626.41 OF THE REGULATIONS, SINCE IT REQUIRED THAT APPELLEE BE INDUCTED DURING THE TIME AN APPEAL OF HIS CLASSIFICATION WAS PENDING?

This point has been touched upon previously but it cannot be too strongly emphasized.

Section 1624.1 provides that registrant must be given an opportunity to appear in person if he files a written request. Section 1624.3 provides that he shall not be inducted during the period affording him the opportunity to appear and *he shall not be inducted until ten days after determination of his classification after personal appearance. After personal appearance he shall again be classified anew.*

Section 1626.41 bears the heading "Appeal postpones induction." By these provisions it was undoubtedly intended that if by chance a personal appearance or an appeal was overlooked after being requested the induction shall be invalid. No other reasonable explanation can be made for this statutory procedure so clearly set forth.

No substitute procedure will suffice. The draft board could not substitute another procedure for that made mandatory by the regulations. Neither could the local board refuse the appellee the right to appeal as was done after the second time appellee was given a I-A-O classification (Tr. 60, 61, 62, 63). The testimony of the appellee in this regard stands unimpeached. The appellant produced no testimony to controvert this testimony. With nothing more in the

record this would be sufficient to show that appellee was denied a right to a personal appearance or to an appeal. Again reference is made to the cases previously herein cited.

CONCLUSION.

The appellee respectfully submits that no error has been or can be shown and the judgment below should be affirmed.

Dated, San Francisco, California,
February 16, 1955.

J. H. Brill,
Atoorney for Appellee.

No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

REPLY BRIEF FOR APPELLANT.

LLOYD H. BURKE,
United States Attorney.
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,517

IN THE

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For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

REPLY BRIEF FOR APPELLANT.

ARGUMENT.

Appellee, in his brief, argues that he was deprived of four specific rights when he was inducted into the army. Three of these claims relate to matters not discussed by Judge Harris in his opinion granting the writ of habeas corpus. These are:

1. That the local board failed to grant LaRose a personal appearance.

2. That appellee did not receive a hearing before the Department of Justice.

3. That appellee was indicted during the time an appeal of his classification was pending.

Appellee also argues that he was denied the right to appeal his classification as the court held below. These arguments appellee lists as his questions presented (Appellee's Brief, pages 6, 7).

In his brief appellee completely ignores the question of exhaustion of administrative remedies raised by appellant in his opening brief. We argued that Judge Harris committed error in granting a writ of habeas corpus because LaRose did not exhaust his administrative remedies by appealing from the Selective Service classification under which he was actually inducted. We cited the case of *Skinner v. United States* (9th Cir.), 215 F. 2d 767, in support of our argument. Skinner was inducted on a classification which was made on April 24, 1953. The court held that if any errors were committed by the local board in the two classifications Skinner had received prior to the April 24 classification, "such errors were corrected by the new classification of April 24, 1953." The court further held that since this classification was not appealed from, any errors were waived.

In the present case appellee was actually inducted under a classification received on September 23, 1952 (File 9). The "errors", if any, urged by appellee (Appellee's Brief, page 9) occurred in January or February 1952 (Tr. 19). After appellee wrote two letters to the board, the board on March 20, 1952 classified him II-S, but appellee was not inducted under this II-S classification. He was inducted under the classification of September 23, 1952. This classification was not appealed from. Appellee, like Skin-

ner, has waived any error which might have occurred in the March 20, 1952 classification. Furthermore, the classification of September 23 corrected any errors which might have occurred in the classification of March 20 just as any errors committed by the local board in the case of Skinner "were corrected by the new classification of April 24, 1953".

Appellee in his brief has simply ignored the well settled principle in Selective Service cases that a registrant must complete the administrative procedure provided under the Act before he may secure judicial review. See *Mason v. United States* (9th Cir.), No. 14,286, and *Williams v. United States* (9th Cir.), 203 F. 2d 85, 88. The three errors which he claimed occurred in his classification all related to the local board's treatment of the two letters which the board received on February 5 and 7, 1952. If the local board had granted him an appeal on the basis of those letters, he would have received a hearing before the Department of Justice. If the local board had interpreted the letters as a request for a personal appearance, he would have received that. However, the local board, as apparently required by *United States v. Vincelli,* 215 F. 2d 210, interpreted the letters as a request for reconsideration and granted appellee a II-S classification. Appellee did not appeal from this classification, or that of September 23.

Appellee's final argument is that appellee was inducted during the pendency of an appeal contrary to Selective Service regulations. However, the undisputed testimony at the trial was that appellee did not

appeal his September 23 classification. When asked on cross-examination whether or not he appealed that classification, he answered "No I didn't (Tr. 61)". No record of an appeal appears in the file.

There was some testimony referred to by appellee at page 13 of his brief to the effect that LaRose contacted members of the Selective Service System in Milwaukee, Wisconsin, and discussed his classification. He did not identify who these persons were. However, there is no finding of fact by Judge Harris on this point pursuant to Rule 52 of the Federal Rules of Civil Procedure. He claims that he spoke with a Deputy State Selective Service Director who declared that an appeal would be useless because "they had just voted on it and reached a conclusion I was a I-A-O and nothing more and there was nothing I could do about it but be drafted". The regulations provide for the local board, not the State Director to classify registrants. An appeal may be taken only "by filing with the local board a written notice of appeal". *Selective Service Regulation 1626.11.* But here there is no testimony in the record that appellee took an appeal either orally or as required in writing. The testimony of appellee only indicates that he had some conversation with Selective Service officials concerning his classification. Nowhere in the record does he claim to have requested an appeal.

Since no appeal was ever taken, the provisions of the regulations discussed by appellee at page 13 of his brief do not apply. Appellee claims that since appellant produced no testimony to contradict his

testimony at pages 60, 61, 62 and 63 of the record at the trial in San Francisco from unidentified witnesses in Milwaukee, Wisconsin, this Court must find that he "took an appeal". However, those transcript references do not show any claim by appellee at the trial that he demanded an appeal before induction. Since they do not say anything about an appeal, it is hard to conceive how there was any burden on the government to show that there was no appeal requested.

Appellee also ignores the case of *United States v. Vincelli,* supra, cited by appellant. This case holds that letters similar to those received by the local board at File 61 must be treated as a request to reopen a classification, exactly what the local board in this case did. He also ignores the plain language of the letters themselves where appellee expressly says, "I would also like to know how I, as a student, stand with your board, disregarding my conscientious objections (Tr. 20, File 63)", and the letter at File 66 which ends "Please, carefully reconsider your classification. I can ask of you nothing more (File 67)."

No reason has been given to this Court why the local board should have ignored the plain mandate of the *Vincelli* case that these letters should be considered as a request for reconsideration. Appellee merely assumes that an appeal, a personal appearance and a hearing before the Department of Justice should have been granted. He then cites cases which hold that a registrant is entitled to those rights on proper request. But he has ignored the crucial ques-

tion. He has assumed the very fact which is in issue—that is, whether he made a proper request in February, 1952 for either an appeal or a personal appearance. This does not constitute a reply to appellant's argument. For this reason and since appellee has apparently conceded that he has not exhausted his administrative remedies, we respectfully request that the writ of habeas corpus heretofore issued be discharged and appellee returned to the custody of appellant.

Dated, San Francisco, California,
March 7, 1955.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellant.

No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Judges Mathews and Chambers of the United States Court of Appeals for the Ninth Circuit and District Judge Byrne.

PRELIMINARY STATEMENT.

With all respect to this Court, it is submitted that the jurisdiction of this Court was never properly invoked in this case; that no appeal was ever validly before this Court; and that, even if this Court's appellate jurisdiction had properly been invoked, the appellee's position should have been sustained for the

reasons indicated in Points II and III below, which are not considered by this Court in its present opinion.

THE ARGUMENT.

I. THIS COURT SHOULD GRANT A REHEARING IN THIS CASE FOR THE REASON THAT THIS COURT IN THE PRESENT OPINION HAS FAILED TO PASS ON OR MENTION THE QUESTION OF WHETHER OR NOT THE JURISDICTION OF THIS COURT HAS BEEN PROPERLY INVOKED TO HEAR THE PURPORTED APPEAL IN THIS CASE.

The transcript of the record in this case reveals (p. 12) that, by notice of appeal, dated August 11, 1954, the respondent Lieutenant General W. G. Wyman appealed

> ". . . to the United States Court of Appeals for the Ninth Circuit *from the order, judgment and decree* of the United States District Court for the Northern District of California issuing a writ of habeas corpus discharging Russell Louis LaRose from the custody of respondent Lieutenant General W. G. Wyman, *made and entered on the 18th day of June, 1954.*" (Emphasis added.)

No judgment or decree was made by the United States District Court for the Northern District of California on the 18th day of June, 1954. The order referred to (Tr. pp. 9-10; Opinion of this Court, pp. 4-5), after setting forth two findings, goes on:

> "the petitioner may have his relief as prayed, upon preparation of findings of fact and conclusions of law.

"It is Ordered that the petition for writ of habeas corpus be, and the same hereby is, Granted.

"Dated: June 18, 1954.

/s/ George B. Harris
United States District Judge"

This then is the order appealed from by respondent in this case.

Section 2253 of Title 28 of the United States Code provides:

"Appeal

In a habeas corpus proceeding before a circuit or district judge, the *final order* shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." (Emphasis added.)

This section specifically makes applicable to habeas corpus proceedings the well settled rule of law that only final orders are appealable. *Collins v. Miller,* 252 U.S. 364; *U. S. ex rel. Bauer v. Shaughnessy,* 178 Fed. 2d 756. Where an order is not a final disposition of a habeas corpus proceeding, no appeal is possible. *O'Leary et al. v. United States,* 53 Fed. 2d 956.

The order appealed from in this case was clearly and on its face not a final order or a final disposition of this matter. First of all, *that* order, the one of June 18, 1954, gave petitioner the relief prayed for, namely the issuance of a writ of habeas corpus, bringing the petitioner merely into Court.

Subsequent to that order, there were two additional orders, on June 23 and June 24, 1955, which

ordered the petitioner discharged and released from the custody and control of the United States Army (Tr. pp. 10 and 11). As a matter of fact, even the June 18th order was to be effective "upon preparation of findings of fact and conclusions of law", which, as this Court has noted (Opinion of this Court, note 12. *Cf. Holiday v. Johnson, Warden,* 313 U.S. 342 at pp. 353-354) were never prepared. The status of petitioner was not changed in any way by the order of June 18th and he remained subjected to the custody of respondent. See *Harkrader v. Wadley,* 172 U.S. 148.

As this Court itself has made clear in *Kellner v. Metcalf,* No. 13309 (201 Fed. 2d 838) where a petitioner presented what purported to be an appeal from an alleged judgment denying a petition for a writ of habeas corpus:

> "Actually, there was no such judgment. Appellant, a prisoner in custody of appellee, a deputy United States marshal, petitioned the District Court for a writ of habeas corpus on December 26, 1951. The writ was issued on December 26, 1951, and was served on appellee on December 27, 1951. Appellee filed a return and produced the body of appellant before the District Court on December 28, 1951. Hearings were had on December 28, 1951, January 4, 1952, and January 11, 1952, but no judgment was ever signed, filed or entered. Therefore the appeal is dismissed."

Since the purported appeal in this case was taken from an order which was not by its very nature final

nor dispositive of the custody of petitioner, this Court lacked jurisdiction to proceed to hear and determine the purported appeal, whatever the action of the parties.

II. THIS COURT SHOULD GRANT A REHEARING IN THIS CASE FOR THE REASON THAT THIS COURT IN THE PRESENT OPINION HAS FAILED TO CONSIDER THE PREJUDICE RESULTING TO APPELLEE FROM THE LOCAL BOARD'S ACTION IN GIVING HIM A CLASSIFICATION OF II-S ON JULY 23, 1952, WITHOUT A HEARING WHEN SUCH CLASSIFICATION, THOUGH NUMERICALLY LOWER THAN I-A-O, WAS NOT NECESSARILY THE APPROPRIATE, CORRECT, NOR LEAST PREJUDICIAL CLASSIFICATION AVAILABLE.

The opinion of this Court sets forth (p. 7) that the letter of appellee dated February 1, 1952, was clearly not an appeal but rather a request that the local board reopen his classification and consider it anew; that no hearing attended by appellee was requested by appellee; and that he was not ". . . in any way prejudiced by the failure to accord him such a hearing. The reconsideration requested and obtained by him resulted in his being put in a lower class (II-S instead of I-A-O), thus benefiting instead of prejudicing him."

The failure of a local board to accord a personal hearing, as required by Selective Service Regulation 1624.1, has repeatedly been held to be such a procedural failure as to invalidate the action taken by a board.

Berman v. Craig, 207 Fed. 2d 888;
United States v. Stiles, 169 Fed. 2d 455.

Even unclear and confused requests have been held to constitute sufficient requests to require this personal appearance (see, e.g.: *United States v. Derstine,* 129 Fed. Supp. 117), "for it cannot be supposed that Congress intended to deal with registrants as if they were engaged in formal litigation, assisted by counsel . . ." *Smith v. United States,* 157 Fed. 2d 176, 183.

The failure of the local board to hear appellee in this case was not clearly lacking in prejudice. While it is true that appellee was classified II-S in the Spring of 1952, such classification was, by regulation, temporary only and subject to annual review (see Selective Service Regulation § 1622.21).

Evidence which appellee might have produced at the required hearing might have resulted in his being placed in categories I-O or I-W. Though Class I-O is numerically higher than Class II-S, it is not in keeping with appellee's expressed beliefs, while Class I-W is, of course, lower. Both, however, are of a more permanent nature and consequently less prejudicial to him than the board's action.

The board's failure to accord this procedural right then was not saved by a demonstrated lack of prejudice, even if such were possible.

III. THIS COURT SHOULD GRANT A REHEARING IN THIS CASE FOR THE REASON THAT THIS COURT IN THE PRESENT OPINION HAS STATED (AT PAGE 7) THAT APPELLEE FAILED TO APPEAL THE I-A-O CLASSIFICATION GIVEN HIM BY THE LOCAL BOARD ON SEPTEMBER 23, 1952, WHEN IN FACT THE RECORD BELOW INDICATES THAT APPELLEE DID ATTEMPT TO APPEAL SUCH CLASSIFICATION.

The opinion of this Court states (p. 7) that:

> "Appellee did not appeal from his I-A-O classification of September 23, 1952, nor did he, on September 23, 1952, or at any time thereafter, request the local board to reopen his classification or to consider it anew. In short, he failed to exhaust his administrative remedies and hence was not entitled to seek relief in the District Court."

In fact, the transcript of record shows clearly, at pages 60 through 63, that appellee, within ten days from the receipt of his I-A-O classification of September 23, 1952, made repeated requests for action at the local board and, upon being told that an appeal would do no good, went directly to the Deputy State Selective Service Director, as advised by the local board, and was again told that an appeal would be useless and he acted, or failed to act, for this reason (Tr. pp. 62-63).

While it is true then that appellee failed to follow the technical requirements for the filing of an appeal, he did do everything which appeared to him to be possible, on the advice of his local board and of the Deputy State Selective Service Director. He thus attempted to comply with the requirements to the

extent of his knowledge thereof and such failure as did occur appears to have been caused by those in authority to whom he looked for guidance. Again, it must be noted that the Courts have repeatedly held that:

> "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."
>
> *Craig v. United States,* 207 Fed. 2d 888;
> *Smith v. United States,* 157 Fed. 2d 176.

It cannot be said then, in the light of the record, that appellee did not do all that was possible to protest and appeal that I-A-O classification of September 23, 1952.

We respectfully submit that a rehearing should be granted for the reasons and for each of the reasons stated in this petition.

Dated, San Francisco, California,
July 15, 1955.

Respectfully submitted,

LAWRENCE SPEISER,
Staff Counsel, American Civil Liberties Union of Northern California,

J. H. BRILL,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 15, 1955.

LAWRENCE SPEISER,
Of Counsel for Appellee and Petitioner.

No. 14519

United States
Court of Appeals
for the Ninth Circuit

WILLIE STANTON and MILDRED C. STANTON, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska, Fourth Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—1-26-55

No. 14519

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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EUGENE V. MILLER,

Box 200, Fairbanks, Alaska,

For Defendant and Appellant.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1815—Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

DWIGHT ROBINSON, Defendant.

ORDER

On the motion of Theodore F. Stevens, United States Attorney, it was Ordered that the mandate in this cause be filed and spread upon the record and that the bondsmen be directed to produce the defendant at 1:30 p.m. Monday, May 17, 1954.

Entered in Court Journal May 11, 1954.

[Title of District Court and Cause.]

ORDER RESETTING TIME FOR SENTENCE

On the motion of Theodore F. Stevens, United States Attorney; Warren A. Taylor, counsel for the defendant being present, it was Ordered that the time for the bondsmen to produce the defendant for the passing of Sentence in this cause be set for 2:00 p.m., Friday, June 4, 1954.

Entered in Court Journal May 28, 1954.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS
June 4, 1954

Theodore F. Stevens, United States Attorney, of Fairbanks, Alaska, attorney for plaintiff.

Warren A. Taylor, of Fairbanks, Alaska, attorney for defendant.

Be It Remembered, that upon the 4th day of June, 1954, the above-entitled cause came on for hearing before the Honorable Harry E. Pratt, District Judge.

The Court: You want to take up this matter of Dwight Robinson next? The order was at two o'clock this was to be brought up?

Clerk of Court: That's right, sir.

The Court: Order resetting time for sentence, reset for today at two?

Clerk of Court: That's right.

The Court: The District Attorney is not here.

Clerk of Court: The bailiff has gone for him, your Honor.

The Court: Mr. Taylor, you are representing Mr. Robinson?

Mr. Taylor: Yes, your Honor.

(At this time, Mr. Stevens entered the courtroom.)

The Court: This is the time set for hearing the matter of sentence of Dwight Robinson. Are you ready to go into that, Mr. District Attorney?

Mr. Stevens: Yes, your Honor.

Mr. Taylor: If the court please, we have been asked, tried to ascertain the whereabouts of Dwight T. Robinson, and we have been unable to do so. Following Mr. Robinson's release on bond he was subsequently imprisoned in the stockade at Ladd Field for striking a non-commissioned officer; and while he was in such stockade the bondsmen, Mr. and Mrs. Stanton, advised the Marshal that they were withdrawing from the bond, from the bail; and, but the Army, disregarding the fact that they knew that this man was under a sentence removed him to the States to Camp Lewis and we understand through Army sources that he has been discharged and that his home address was in New York, Niagara Falls. And then I got another notice that he lived in Ashland, I believe it was, Ashland, West Virginia.

We have sent wires to both places but the, we have not received any answer from West Virginia yet. We have had them out this week but we did get an answer from Niagara Falls. He was not there. So, as far as I know, Mr. Robinson is not in the Territory at the present time, unless he is on his way back now.

Mr. Stevens: Your Honor, Mr. Robinson was a serviceman over whom the service would not accept responsibility, of whom they would not accept responsibility. And he was incarcerated in the Federal jail for several months and two bondsmen signed a bond for his release and upon his release he was released and went back to the service and the service did rotate him. That is true. But we view

that just the same as if a civilian having been released on bond got into trouble somewhere in the State of Washington. It would be up to the bondsmen to produce him. He was rotated and sent home. We believe that it was up to the bondsmen to produce him here, and we know of no demand which was made upon the Marshal to take him back into custody, and there was no certified copy of the bond filed placed in the Marshal's hands for his re-arrest pursuant to our laws. And I believe, your Honor, we have a man who now is a fugitive from justice and I ask that your Honor issue a bench warrant for his arrest and forfeit the bond.

The Court: The bond is forfeited, the defendant having failed to appear today according to the order of the court. Is there something you wish to say, Mr. Taylor?

Mr. Taylor: Yes, your Honor. I was going to rectify a statement by Mr. Stevens. Mr. Robinson did return to duty, but he got in trouble by hitting a Sergeant and was in Army custody in the stockade at Ladd Field when Mr. and Mrs. Stanton surrendered him to the Marshal. They couldn't surrender him personally to the Marshal, but he was in custody in this jurisdiction and then the Army took him outside. I don't think now, Mr. Dwight Robinson was not rotated. He was taken out to be given an undesirable discharge, not that he had finished his enlistment, but to give him an undesirable discharge because in addition to the trouble he got into here he had hit the Sergeant. We don't think that the forfeiting of the bond, your Honor,

is perhaps right at this present time, to give them a chance to get him back. We know that he was taken to the States by force by the Army out of the jurisdiction of this court when they knew that he was being held for the civil authorities.

The Court: Well, this bond, this transcript from the Court of Appeals shows their proceedings, but it shows nothing, of course, about anything between Mr. Robinson and the United States Marshal here of this division. Now, this was spread upon the record of the court on the 11th of May, 1954. I think if you had had some legitimate defense you would set it forth in writing and that your oral statements just made can't be accepted. So I, I allow the order which I just mentioned a few minutes ago of forfeiting the bond because he has failed to appear here today. I will allow that to stand.

Mr. Stevens: Will your Honor also issue a Bench Warrant?

The Court: And a Bench Warrant will be issued for the arrest of Mr. Robinson.

Mr. Stevens: Thank you, sir.

The Court: I presume that will be started later on to collect on that forfeited bond. Now, in this case I think the judgment should be amended whenever the facts warrant the same, but that it be amended to show how much time he served, if any, on his prison sentence in this court. That should be a matter that should be taken up by an amended, by an amendment to the judgment.

Mr. Stevens: Your Honor, the defendant filed no election to serve any time. The time he served

was before his sentence and a few months thereafter. I don't know how long he was in jail. He was released some time in December, as I remember.

The Court: Well, does his failure to file that consent—— (Interrupted).

Mr. Stevens: He has to file an election under the Federal Rules if he wishes his incarceration to count against his sentence.

The Court: Well, you have to cite those matters and show the situation.

Mr. Stevens: Very well, your Honor.

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

ORDER RE BOND

The Government was represented by Theodore F. Stevens, United States Attorney; the defendant was represented by Warren A. Taylor.

Mr. Taylor presented a statement to the Court regarding the present whereabouts of the defendant.

Mr. Stevens moved for the forfeiture of the bond of the defendant and the issuance of a Bench Warrant for his Arrest.

It was Ordered that the bond be forfeited and that a Bench Warrant be issued for the defendant who is apparently a fugitive from Justice.

Entered in Court Journal June 4, 1954.

[Title of District Court and Cause.]

WARRANT FOR ARREST OF DEFENDANT

To any United States Marshal or other qualified officer:

You are hereby commanded to arrest Dwight T. Robinson and bring him forthwith before the United States District Court for the Fourth Division, District of Alaska, in the city of Fairbanks to answer to an Order of the District Judge of the above-entitled Court that the defendant be produced for sentencing.

Date: June 4, 1954.

[Seal] /s/ JOHN B. HALL, Clerk

Return

Southern District of West Va.—ss.

Received the within warrant the 12th day of July, 1954, and executed same.

/s/ W. H. McGINNIS,
/s/ By MORRIS B. IMBODEN

District Court of the United States, Southern District of West Virginia, Fourth Division

Commissioner's Docket No. 1, Case No. 281

United States of America vs. Dwight Thompson Robinson.

Box 285, Ashland, W. Va.

WARRANT OF REMOVAL

To: William H. McGinnis, U. S. Marshal for Southern District of West Virginia:

The United States District Court at Fairbanks, Alaska having indicted, tried and convicted Dwight Thompson Robinson, on a charge of bank burglary, and Dwight Thompson Robinson, having been arrested in the Southern District of West Virginia, upon a bench warrant issued by District Judge Harry Pratt, of Fairbanks, Alaska, after waiving hearing is hereby committed by the United States Commissioner to your custody pending his removal to that District.

You are hereby commanded to remove Dwight Thompson Robinson forthwith to Fairbanks, Alaska, and there deliver him to the United States Marshal for that District or to some other officer authorized to receive him.

Dated at Bluefield, West Virginia, this 12th day of July, 1954.

[Seal] /s/ HOWARD M. JARRETT,
United States Commissioner, for the Southern District of West Virginia.

WAIVER OF REMOVAL

On this day personally appeared Dwight Thompson Robinson, before Howard M. Jarrett, U. S. Commissioner, for the Southern District of West Virginia, and after explaining to him that a bench

warrant had been issued by District Judge Harry Pratt, at Fairbanks, Alaska, for the crime of Bank Burglary, and further, his constitutional rights and a right of being represented by counsel, does hereby waive a removal hearing and requests that he be returned to Fairbanks, Alaska to answer said bench warrant.

/s/ DWIGHT T. ROBINSON

Approved this 12th day of July, 1954.

[Seal] /s/ HOWARD M. JARRETT,
United States Commissioner, for Southern District of West Virginia.

(United States District Court for the Southern District of West Virginia, at Charleston, in said District, on July 14, 1954.)

United States of America vs. Dwight T. Robinson—No. 640.

UPON REMOVAL

This day came the United States Attorney and made known to the Court, by petition filed herewith, that Dwight T. Robinson is now confined in the Raleigh County Jail, this District, upon a commitment made by United States Commissioner Howard M. Jarrett, for the purpose of obtaining an order of removal of the said Dwight T. Robinson to the District of Alaska (Division No. 4), in which District the offense for which said prisoner has been committed is to be tried.

And Whereas, the United States Attorney for the Southern District of West Virginia has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant of removal of said prisoner to the District of Alaska (Division No. 4), now therefore, it is ordered that the Marshal for this District do remove the body of the said Dwight T. Robinson from the Raleigh County jail and safely convey him to the District of Alaska (Division No. 4) in order that he may be dealt with according to law.

Enter: July 14, 1954.

[Seal] BEN MOORE, District Judge

A true copy: Attest /s/ Homer W. Hanna, clerk.

Received this Removal Order at Charleston, W. Va. on July 14, 1954 and on July 18, 1954 I removed the within named Dwight T. Robinson from the Raleigh County Jail, Beckley, W. Va. and on July 19, 1954 I delivered him to the United States Marshal for the Northern District of Illinois, Chicago, Ill.

William H. McGinnis, United States Marshal, Southern District of West Virginia

/s/ By Morris B. Imboden, Deputy

Marshal's Return, Northern District of Illinois

Received the within named Dwight T. Robinson on July 19, 1954 from the United States Marshal, Charleston, West Virginia, for delivery to the

United States Marshal, Seattle, Washington, for further delivery to the District of Alaska, Division 4. The within named was delivered to the United States Marshal, Seattle, Washington on 7-22-1954.

/s/ W. W. Kipp, Sr., United States Marshal, Northern District of Illinois (Chicago, Illinois)

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT

Comes now the attorney for the Government, Theodore F. Stevens, in the above entitled cause, and moves this Honorable Court, pursuant to Rule 46(f)(3) of the Federal Rules of Criminal Procedure, to enter a judgment of default against Willie and Mildred C. Stanton on the ground that said Willie and Mildred C. Stanton were co-sureties on a bail bond filed by the defendant Dwight Robinson for appearance before this Honorable Court.

Said bond was declared forfeited by this Court on the 4th day of June, 1954, and since that time said bondsmen have refused to pay the sum of Five Thousand Dollars ($5,000.00), and no part thereof has been paid.

Wherefore, plaintiff moves this Honorable Court for judgment against the said Willie and Mildred

C. Stanton in the amount of Five Thousand Dollars ($5,000.00).

Dated at Fairbanks, Alaska, this 23rd day of July, 1954.

/s/ THEODORE F. STEVENS,
United States Attorney

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: John B. Hall, Clerk of Court:

Please take notice, as agent for the bondsmen herein, that the undersigned will bring the attached motion on for hearing before this Court, in the Courtroom of the Federal Building, Fairbanks, Alaska, on the 26th day of July, 1954, at 1 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

Dated at Fairbanks, Alaska, this 23rd day of July, 1954.

/s/ THEODORE F. STEVENS,
United States Attorney

Marshal's Return on Service of Writ attached.

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS
July 26, 1954

Theodore F. Stevens, United States Attorney, of Fairbanks, Alaska, attorney for plaintiff.

Warren A. Taylor, of Fairbanks, Alaska, attorney for defendant.

Be It Remembered, that upon the 26th day of July, 1954, the above-entitled cause came on for hearing before the Honorable Harry E. Pratt, District Judge.

Mr. Stevens: Your Honor, Dwight Robinson, in case No. 1815, criminal, is in court. The mandate from the Court of Appeals has been spread on the record and we ask that the court enter a resentencing of this defendant. He was convicted by this court, you Honor, and sentenced on the 30th day of December, 1953, and his appeal was dismissed by the Ninth Circuit Court, and on the 11th day of May of this year we asked the court to spread the mandate on the record and it was spread on the record.

The Court: Anything further?

Mr. Stevens: No, your Honor, if we may have the resentencing entered.

The Court: Before the court pronounces modification of the sentence do you, Mr. Taylor, have anything to say on the subject?

Mr. Taylor: No, your Honor.

The Court: Well, then, as I understand you, Mr.

District Attorney, the defendant has been at liberty on supersedeas bond or in failure to conform to the orders of this court at all times since the pronouncement of the original sentence in this case?

Mr. Stevens: Your Honor, the defendant was at liberty on bond filed pursuant to his notice of appeal and was absent from this court on the date set for the defendant to be present in court and, therefore, at our request, your Honor issued a Bench Warrant for Mr. Robinson's apprehension and he was arrested in West Virginia, I believe, and was transported back to this District by the United States, and at this time we ask that the court re-enter its judgment and commitment which was entered on the 29th day of December at which time your Honor sentenced the defendant to three and one-half years.

The Court: Well, you don't mean to give him credit on his sentence do you, for time that he did not spend?

Mr. Stevens: No, your Honor. We wish to have the judgment and commitment amended to read that it shall begin today.

The Court: That's better.

Mr. Stevens: Yes, sir, thank you.

The Court: Still nothing further from the defendant, Mr. Taylor?

Mr. Taylor: No, your Honor, not in regard to the sentence. I believe the court, it is mandatory to give the same sentence as before.

The Court: Very well. Stand up, Mr. Robinson, then. Mr. Robinson, it is the judgment of the court,

then, the amended judgment of the court that you be confined in the custody of the Attorney General of the United States in an institution of the penitentiary type for a period of three and one-half years from today.

Mr. Stevens: Thank you, your Honor.

The Court: Nothing further, Mr. Robinson.

Mr. Stevens: Now, your Honor, pursuant to Rule 46(f) 3 of the Federal Rules of Criminal Procedure, we have made a motion for judgment against the bondsmen and served the motion for judgment upon the Clerk of this Court as the agent for the bondsmen in this case. The bondsmen in this case signed a bond that they would produce Dwight Robinson on the order of this court and they failed to do so, and the bond was declared forfeited on the 4th day of June, 1954. Since that time the bondsmen have refused to pay any amount and we ask, pursuant to Rule 46(f) 3 of the Federal Rules of Criminal Procedure that a judgment be entered in this cause against the two bondsmen in the amount of five thousand dollars.

The Court: Any objections, Mr. Taylor?

Mr. Taylor: Yes, your Honor, I have objections to this matter. This is the first I knew that this was coming up. I think it was pursuant to the action of the bondsmen themselves, your Honor, that this man is in court. In fact, at the time we learned where Mr. Robinson was he informed us that he had been taken out forcibly by the Army out of the jurisdiction of this court in spite of the protest of Mr. Robinson and he was taken back, he was

sent back to his home in West Virginia and he informed me as to his whereabouts, that he wanted to get back here so he could be sentenced. A copy of that letter is in the District Attorney's possession, your Honor, and I gave the District Attorney a copy of the letter so that the, if the Department of Justice wanted to pick him up they could pick him up. But at the time he was picked up the bondsmen was making arrangements with Pan-American Airlines, your Honor, to transport him back from his home in West Virginia.

Now, it wasn't by reason of this defendant's acts that he was outside of the Territory. It was by reason of the plaintiff's act, the government of the United States took him out and he wanted to come in and the Army told him that everything was over here in Fairbanks and when they took him out, when he wanted to come in to see me as his attorney. We would like to make a showing on this, your Honor, because it seems like it would be unjust where he has returned here.

The Court: How much time do you want?

Mr. Taylor: I would like a week, your Honor, at least.

The Court: Any objections?

Mr. Stevens: Your Honor, I believe the proper procedure, if Mr. Taylor wishes a remission of this amount, Mr. Taylor's procedure is to apply for a remission. The government is entitled to judgment. If he wants the whole amount back he can make his showing. As it stands right now, the government has incurred expense in picking up this defendant

pursuant to the Bench Warrant issued from this court and Rule 46(f) says that if the amount is not paid into the court then judgment shall issue, and it provides for—. We have no objection for setting on a time of Mr. Taylor's motion for a remission of the amount, but we ask for the court to enter the judgment which I believe is according to the Rules and it states that it shall issue.

The Court: I think the District Attorney has stated the law that controls in the case. You want one week do you, Mr. Taylor?

Mr. Taylor: Maybe more than that. I have got to get some affidavits from some Army officers here who will testify that they took him out forcibly against his will, and also of the defendant, I would like him not to be taken out until this matter is heard so I can get affidavits from him and also various other affidavits to show that he did nothing voluntarily.

The Court: I don't think I will be inclined to wait any longer than is convenient to the Marshal in regard to taking the defendant out of Alaska, but I will give you a week, if you like.

Mr. Taylor: Yes, your Honor.

The Court: To take care of the whole matter.

Mr. Stevens: Your Honor, do I understand that pursuant to our motion the judgment will issue today and Mr. Taylor makes application for remission?

The Court: I told him that I considered that the correct procedure and the correct statement of the

law that you made. Naturally, that would follow what I had said.

Mr. Stevens: Thank you, your Honor. We have prepared a judgment for that case.

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

ORDER

The Government was represented by Theodore F. Stevens, United States Attorney; the defendant was present in person in custody of the United States Marshal and with his counsel Warren A. Taylor.

On the motion of Mr. Stevens, Mr. Taylor having waived any statement to the Court, the Court announced that it was the Amended Judgment of the Court that the defendant be confined in an Institution of the penitentiary type, to be selected by the Attorney General, for the period of three and one-half years, beginning today.

On the motion of Mr. Stevens and under the provisions of Rule 46, F, (3), it was Ordered that a Default Judgment be entered against the bondsmen in this cause.

It was further Ordered that the argument on the defendant's motion for the Remission of the above Judgment on the bond be set for 1:00 p.m., Tuesday, August 3, 1954.

Entered in Court Journal July 26, 1954.

[Title of District Court and Cause.]

AMENDED JUDGMENT AND COMMITMENT

Whereas, Judgment has issued in this cause as set forth in the attached copy of Judgment and Commitment, which is hereby incorporated herein as though fully set forth, and

Whereas, the defendant, Dwight T. Robinson, filed Notice of Appeal on the 4th day of January, 1954, and posted appeal bond on the 2nd day of February, 1954, staying execution pending said appeal, which appeal was dismissed on the ground that appellant failed to file the record on appeal in accordance with Rule 39(c) of the Federal Rules of Criminal Procedure, and a Mandate issued thereon affirming said conviction, said Mandate being filed with this Court on the 11th day of May, 1954; and thereafter on order to appear before this Court pursuant to said Mandate, said defendant, Dwight T. Robinson, appeared in person and with counsel,

Wherefore, it is the judgment of this Court that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three and one-half (3½) years, such sentence to commence on the 26th day of July, 1954.

It Is Ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the copy serve as the commitment of the

defendant herein, and that said defendant pay the cost of this action in the sum of $....., to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 26th day of July, 1954.

/s/ HARRY E. PRATT,
District Judge

Entered in Court Journal July 26, 1954.

[Endorsed]: Filed July 26, 1954.

In the District Court for the District of Alaska, Fourth Judicial Division

No. 1815—Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

DWIGHT ROBINSON, Defendant.

JUDGMENT

Whereas the above named defendant was tried and convicted in the District Court for the District of Alaska, Fourth Judicial Division, on the 7th day of December, 1953.

And Whereas a Judgment and Commitment was duly entered in said Court on the 30th day of December, 1953.

And Whereas, the said Dwight Robinson, on the 4th day of January, 1954, filed a Notice of Appeal

in the United States Court of Appeals for the Ninth Circuit.

And Whereas, on the 31st day of March, 1954, said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the Motion of Appellee to dismiss the said appeal and was ordered and adjudged dismissed.

And Whereas, on the 11th day of May, 1954, the mandate in this cause was filed and spread upon the record in the District Court for the District of Alaska, Fourth Judicial Division and the bondsmen directed to produce the said defendant for sentencing.

And Whereas, on the 4th day of June, 1954, said defendant failed to appear for sentencing, it was ordered that the bond be forfeited and a bench warrant be issued for the arrest of the said Dwight Robinson.

And Whereas, the bondsmen have refused to pay the sum of Five Thousand Dollars ($5,000.00), and no part thereof has been paid, Now Therefore,

It Is Hereby Ordered, Adjudged and Decreed, that Willie and Mildred C. Stanton, the bondsmen for the defendant herein, pay to the Clerk of the Court the sum of Five Thousand Dollars ($5,000.00).

Done at Fairbanks, Alaska, this 26th day of July, 1954.

/s/ HARRY E. PRATT,
District Judge

Entered in Court Journal July 26, 1954.

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Cause.]

MOTION FOR REMISSION OF FORFEITURE OF BOND

Comes now Warren A. Taylor, attorney for the defendant above named, and moves this Court for an order setting aside the Forfeiture of Bond entered in this Court on the 26th day of July, 1954, upon the grounds that there was no willful default in the terms of the bond, and for the further reason that the default in the appearance of defendant was occasioned by the acts of the obligee of said bond, to wit: the United States of America; and for the further reason that the said bond had not been forfeited prior to his appearance for sentencing.

That this motion is based upon the affidavits of Dwight Robinson, Willie Stanton, Warren A. Taylor, Major Charles Junes, Captain Wise, and others, which said affidavits are attached hereto and made a part of this motion.

/s/ WARREN A. TAYLOR,
Attorney for Defendant, and Willie Stanton, Bondsman

AFFIDAVIT IN SUPPORT OF MOTION FOR REMISSION OF BOND

United States of America,
Territory of Alaska—ss.

Warren A. Taylor, being first duly sworn, upon his oath deposes and says: That he is the attorney

for the above named defendant, and also for Willie Stanton and wife, the obligors on a supersedeas bond for the release of defendant.

That after the conviction of the defendant of the crime of larceny, defendant gave notice of appeal to the Circuit Court of Appeals, Ninth Circuit, and bond in the sum of $5,000.00 was filed herein and defendant released, and he returned to his station at Eielson Air Force Base.

That shortly thereafter said defendant got in trouble and was sentenced to 30 days in the stockade.

That affiant was informed of defendant being held in the stockade and requested that defendant be escorted to Fairbanks for a conference with the defendant regarding his appeal. This request was refused, although the military had prior thereto been very cooperative in such matters.

Some time in April or May, 1954, affiant again inquired about defendant, and was informed by the military authorities that defendant had been taken to the States for discharge from the Army.

That thereafter affiant wrote to an address in Niagara Falls, New York, which address was of a brother or other relative of defendant.

That defendant, on the 10th day of June, 1954, wrote to affiant from Niagara Falls, New York, advising of receipt of affiant's letter and that he was taken from Alaska by the Army against his will and discharged at Fort Lewis, and had no money to come back to Alaska.

That upon receipt of said letter affiant advised

the U. S. Attorney of defendant's address, and also that the bondsman, Willie Stanton, was making arrangements to have defendant return to Fairbanks via air. That said Willie Stanton consulted with Alaska Airlines and Pan-American World Airways regarding the cost of a ticket from West Virginia, where defendant was at the time he consulted the airlines.

That a copy of defendant's letter to affiant is attached hereto and made a part hereof.

That affiant was informed by officers at Eielson and Ladd Air Force Bases that defendant had been transported to the States, and that the Court officials had been informed of the proposed transportation and that they had been advised that it was satisfactory to take defendant to the States for discharge.

Affiant contends that as the obligee of said bond, the United States, by its military branch, transported said defendant out of the jurisdiction of the Court and rendered it impossible for defendant to appear for sentencing.

That Willie Stanton did all that could be done to secure the return of defendant to this Court's jurisdiction. Stanton likewise should not be subjected to the penalty of the bond when the invocation of the penalty was caused solely by the obligee.

That it would be grossly inequitable to require the bondsmen to pay the sum of $5,000.00 when the defendant did not wish to leave the Territory of Alaska, but was forced by the military to depart the jurisdiction of this Court and to furnish an air-

plane ticket for defendant to return to Alaska, and had, in fact, made arrangements for the transportation of defendant to Alaska.

That the default of the defendant was not wilful, and this Court has power and authority to remit said forfeiture under Rule 46(f2) Federal Rules of Criminal Procedure.

/s/ WARREN A. TAYLOR

Subscribed and Sworn to before me this 2nd day of August, 1954.

[Seal] /s/ WARREN WM. TAYLOR,
Notary Public in and for Alaska

213½ 13th St., Niagara Falls, N.Y.

Dear Mr. Taylor: June 10, 1954

I received your wire a few days ago but I dont have any money to come back to Alaska the Army didn't pay me any money at all I try to get them to let me come and see you before I left but they would not. and Mr. Jones told me that they would take care of everything. I been trying to get a job so I could pay you but I havent found one yet so if they did not fix it and they still want me I will be here when the come after me because when I left Alaska I didn't leave on my own. Don't get me wrong Mr. Taylor if I had the money I would be glad to come back but now I dont have anything and no money lighter Mr. Taylor I'm going to pay you as soon as I get able or as soon as

I get a Job but when I left Alaska I though I were a free man. I knew that I owe you but the way they told me, that the rest of that stuff were over with so I be here if they want me.

Your truly,

Dwight

AREGS 220.45 Robinson, Dwight T. RA13322489
Major Clark, 4th AAA Gp, APO 731, USAF
Hq 450th AAA Bn, APO 937, USAF
Capt Damron/wes 8 Jun 54

In December 1952 correspondence was initiated by this headquarters to cause Robinson to appear before a Board of Officers, convened under the provisions of AR 615-368. I believe the Board was convened in February 1953 and recommended that subject be separated from the service under AR 615-368. The Board proceedings were then forwarded thru channels to USARAL for approval. On 30 March 1953, Robinson was tried by Summary Court for violation of Article 86, UCMJ and sentenced to confinement at hard labor for thirty (30) days and to forfeit $60. He was committed to the Base Stockade, Ladd on 30 March 1953. On 3 April 1953, subject was released by the stockade to Civil authorities, Fairbanks, Alaska, and was confined in the Federal jail waiting trial for the charge of larceny. During the month of January 1954 he was tried, convicted and sentenced to 3½ years confinement. On 4 February 1954 Robinson was released on $5,000 bail pending decision of appeal of

sentence filed in the U. S. Circuit Court of Appeals, San Francisco, California. This headquarters was furnished a letter by the clerk of Court, Fairbanks, indicating conviction and release on bail which was sent to MSgt Brinkman, 4th RCT, who forwarded the approved Board proceedings (AR 615-368) and letter from clerk of Court to USARAL for instructions. USARAL directed that EM be returned to the ZI for separation UP AR 615-368. Subject was placed on Special Orders, paragraph 5, SO 47, Hq 4th RCT dtd 26 February 1954 and departed this station 2 March 1954.

Alton F. Damron, Capt Arty
Adjutant

Certified true copy: Signed Edwin H. White, Capt. JAGC, Staff Judge Advocate.

United States District Court, Office of the Clerk, District of Alaska, Fourth Division, Fairbanks, Box 1350, Alaska.

Commanding Officer February 4, 1954
450th AAA Battalion, Eielson Air Force Base
Eielson Field, Alaska

Dear Sir:

This is in reply to an inquiry as to the status of our Criminal No. 1815, entitled United States of America, Plaintiff vs. Dwight T. Robinson, Defendant.

On December 29, 1953, Dwight T. Robinson was sentenced and committed to the custody of the At-

torney General or his authorized representative for imprisonment for a period of three and one-half years (3½), for the crime of Larceny.

On January 4, 1954, a Notice of Appeal to the U. S. Circuit Court of Appeals, Ninth Circuit, San Francisco, California, was filed by Warren A. Taylor, attorney for Dwight T. Robinson. Since that time Mr. Robinson has been released on a $5,000.00 Supersedeas Bond, and will be out on bond until the appeal is heard in San Francisco, California.

Very truly yours,

/os /s/ John B. Hall, Clerk

A true copy: Signed Matthew M. Wotherspoon, 1st Lt. Infantry, Assistant Adjutant.

AFFIDAVIT OF WILLIE STANTON AND MILDRED C. STANTON

United States of America,
Territory of Alaska—ss.

Willie Stanton and Mildred C. Stanton, each being duly sworn upon oath depose and say: That they were bondsmen for the appearance of Dwight Robinson before the District Court, Territory of Alaska, Fourth Division, upon a charge of burglary and larceny. That the said Dwight Robinson was convicted of larceny and sentenced to 3½ years in the penitentiary, from which conviction he appealed to the Circuit Court of Appeals for the Ninth Circuit. That the Court set $5,000 as the amount of the supersedeas bond and affiants then entered on

such bond for Mr. Robinson's appearance in the event that the said appeal was overruled. That after the supersedeas bond was executed by the affiants Dwight Robinson was released and returned to duty with B Battery of the 450th AAA Battalion at Eielson Air Force Base.

Sometime after his return to duty affiants were informed that Mr. Robinson had gotten into trouble with his officers at the said Battery and that he was confined in the military stockade as a military prisoner. Upon learning of this, affiant Mildred C. Stanton, went to the United States Marshal's office at Fairbanks and informed the Marshal that she wanted to surrender Robinson to the Marshal and told the Deputy Marshal with whom she talked of the circumstances of Robinson's incarceration in the stockade. To this the Marshal replied that as he was in the custody of the military the sureties were automatically released from the bond. Affiants thereupon paid no further attention to the matter as they believed they were no longer on the bond as sureties. This belief persisted until the time affiants were notified by the U. S. Attorney to produce Robinson within one week from the date of the notice.

Affiant, Willie Stanton, went to see Mr. Stevens about the matter and he told affiant Robinson was still in the Territory. Mr. Yeager, Assistant U. S. Attorney, told affiant Robinson was working on the pipeline at Tok, Alaska. This was a long time after Robinson had been taken to the States by the authorities.

Affiant then went to Mr. Taylor, Robinson's attorney, and was informed that Mr. Taylor had received a letter from Robinson which he showed to affiant, and showed that Robinson was willing to come back to Alaska but had no money for the trip. Mr. Taylor told affiant to make arrangements to have Robinson flown back to Alaska from his home in West Virginia. Affiant then went to Alaska Airlines and Pan American Airways and found that he could have Robinson flown back for $258.00 first class fare or $227.85 for coach fare to Seattle and first class from Seattle to Fairbanks.

That affiant, Willie Stanton, has known Mr. Robinson for a period of a year or more and became his bondsman as a matter of friendship and executed the said bond without any compensation for doing the same.

At the time that affiant ascertained the cost of returning Robinson to the Territory of Alaska from West Virginia a newspaper article came out in the Fairbanks Daily Newsminer stating that Robinson had been picked up by the Department of Justice and was being returned to Fairbanks.

That upon learning of Robinson's whereabouts affiant made every effort to procure his return to Fairbanks.

Affiant is informed, as shown by the letter from Mr. Robinson and Mr. Robinson's affidavit, that Robinson was taken to the States by the military authorities and discharged at Camp Lewis, Wash-

ington, and only had $10.00 at the time of his discharge and was unable to come back to Fairbanks, and finally secured a loan of $30.00 from his mother to go to Niagara Falls, New York, where his sister resided.

That Dwight Robinson at no time has been a fugitive from justice, nor did he voluntarily absent himself from the jurisdiction of this Court, but was forcibly taken therefrom by an agency of the United States, the obligee on the said bond.

That the affiant is informed that this Court was notified by letter that Dwight Robinson was being taken from the jurisdiction of the Court, and is also informed by the Legal Officer at Ladd Field that the United States Attorney's office was notified of Robinson's removal from the Territory of Alaska.

That the affiants are married and have one infant child and are buying their home at Fairbanks, Alaska, and are unable to pay the said bond without sacrificing property which they are purchasing for their home.

Affiant is buying several pieces of property but to force a sale of them at the present time would necessarily sacrifice them.

Affiants firmly believe in view of the fact that Robinson was forcibly taken from the Territory of Alaska that they are released from the obligation of the bond.

/s/ WILLIE STANTON
/s/ MILDRED C. STANTON

Subscribed and Sworn to before me this 2nd day of August, 1954.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public in and for the
Territory of Alaska

Acknowledgment of Service attached.

[Endorsed]: Filed August 2, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF THEODORE F. STEVENS

I, Theodore F. Stevens, being first duly sworn on oath depose and say:

That I am the United States Attorney for the Fourth Judicial Division, District of Alaska.

That I categorically deny that Willie Stanton ever saw me concerning the whereabouts of Dwight Robinson. As a matter of fact, I requested one of the Deputy Marshals to notify Willie Stanton that Mr. Taylor had information concerning the whereabouts of Dwight Robinson and that if he, Willie Stanton, would arrange to get Dwight Robinson back to Alaska, we would not seek a judgment to enforce the forfeiture which had been imposed upon Dwight Robinson's sureties by this Court.

That Willie Stanton did not come to see me, but instead Mrs. Willie Stanton came to my offic and was informed that if she and Mr. Stanton would arrange to have Dwight Robinson flown back to the

Territory, we would see to it that the forfeiture would not be imposed.

That Dwight Robinson was confined in the Federal Jail, in lieu of a Five Thousand Dollar ($5,000.00) bond, for some time after he was sentenced by this Court. That at the time Willie Stanton signed the appearance bond for Dwight Robinson, your affiant questioned Mr. Stanton at length to determine whether or not Mr. Stanton actually realized the risk he was undertaking. That, at the time Mr. Stanton signed the bond, your affiant told him that Dwight Robinson was to report back to the military and that he, Willie Stanton, would be responsible for Dwight Robinson's whereabouts. The Army would not have been able to rotate Dwight Robinson from the Territory of Alaska if Mr. Stanton had not agreed to sign his bail.

That your affiant learned there was rumor that Dwight Robinson was working on the pipeline somewhere near Tok Junction, Alaska and that this rumor came to me directly from Dwight Robinson's attorney, Mr. Warren A. Taylor.

That even after the Federal Bureau of Investigation had apprehended Dwight Robinson, who had been classified as a fugitive from justice, due to the fact that he had failed to appear before this Court and his bond was thereupon forfeited, your affiant contacted Willie Stanton through Chief Field Deputy, Theodore R. McRoberts and informed Mr. Stanton that if he would put up the money to send a United States Marshal to West Virginia to bring

Dwight Robinson back to the Territory, we would not enforce the forfeiture of the bond. That Mr. Stanton told Chief Field Deputy McRoberts to see his lawyer, that he was not going to pay any amount to bring Dwight Robinson back to the Territory of Alaska.

In regard to the statements of Mr. and Mrs. Stanton concerning their financial ability, these people have justified themselves under oath to the extent of $20,000. Each time the Stantons have signed a bond, I have personally questioned them to ascertain whether or not they understood the risk they were taking and each time I told them that signing the bond meant that they were indebted to the United States for the full extent of the bond in the event the principal failed to obey the order of the Court.

In regard to the rotation of Dwight Robinson to the continental limits of the United States by the Army, this office was not informed that Dwight Robinson had been rotated until Mr. Warren A. Taylor provided us with such information immediately prior to the forfeiture of the bond by this Court. However, the letter from the Clerk of this Court, dated February 4, 1954, shows that Dwight Robinson was released on bond and would be out on bond until the appeal was heard in San Francisco. The communication from Captain Alton F. Damron to Major Clark, dated June 8, 1954, shows that, inasmuch as Dwight Robinson was released on bond, the Board of Officers for the Army deemed

it advisable to discharge Dwight Robinson from the military.

Attached hereto is a copy of Dwight Robinson's orders which were received by him on or about the 26th day of February, 1954.

Dwight Robinson failed to notify his bondsmen that he was leaving the Territory of Alaska. Also, your affiant points out that Dwight Robinson was discharged at Fort Lewis, Washington and instead of returning to Alaska, saw fit to travel further from the jurisdiction of this Court, namely, to New York and West Virginia.

Your affiant believes that the Stanton's were advised firmly, at every step of the proceeding, of the risk they were taking and were given every opportunity to escape the penalties for Dwight Robinson's failure to comply with the rules of this Court and save themselves some expense, but on every occasion, they refused to accept your affiant's assistance and have refused to comply with the orders of this Court.

Dated at Fairbanks, Alaska, this 3rd day of August, 1954.

/s/ THEODORE F. STEVENS

Subscribed and sworn to before me this 3rd day of August, 1954.

[Seal] /s/ WALLIS C. DROZ,
Notary Public in and for the
Territory of Alaska

Headquarters, 4th Regimental Combat Team, APO 731, c/o Postmaster, Seattle, Washington.

Special Orders Number 47 26 February 1954

Extract

5. Pvt-1 Dwight T Robinson RA 13 322 489 MOS: 1602 Race: Neg Term of Enl: 3 yrs ETS: Apr 54 Date departed US: Mar 51 Date elig rtn US: Sep 53 Rel Pref: Prot Btry B 450th AAA Bn (AW) (Smbl) APO 937 USAF EM WP o/a 5 Mar 54 to 6021st ASU Fort Lewis Wash RUAT to CO Separation center for Separation PAC AR 615-368 (Undesirable Discharge) to be separated at separation point at port of entry 6021 ASU Fort Lewis Wash TBMAA and/or RAII Trans Directed Non-Mil Add: Box 32 Ashland W Va Clo as prescribed in USARAI Cir Sec II 128/53 will be worn and bag not to exceed 65 lbs auth for mil acft Excess bag will be shipped by TO PAC Par 10 SR 55-160-1 PCS TDN 2142010 401-10 P1410-02 03 S99-999 Auth: AR 615-368 (Undesirable Discharge) 4th Ind CG USARAL dtd 18 Feb 54 Subj: Report of Proceedings of Board of Officers (AR 615-368) Air Designator: US-AL-3D-4773-GF3 EDCSA to 6021 ASU Ft Lawton Wash: 28 Mar 54

By Order of Colonel Lundquist:

Official: L H Calhoun, 1st Lt Inf
Asst Adjutant

s/ L. H. Calhoun, 1st Lt Inf Asst Adjutant

AFFIDAVIT OF GEORGE M. YEAGER

United States of America,
Territory of Alaska—ss.

I, George M. Yeager, being first duly sworn on oath depose and say:

That I am an Assistant United States Attorney for the Fourth Judicial Division, District of Alaska.

That I remember telling Willie Stanton I had heard a rumor that Dwight Robinson was working on the pipeline near Tok Junction, Alaska. That Willie Stanton had come to me concerning Dwight Robinson's whereabouts and I told him to see Robinson's attorney.

That this conversation with Willie Stanton occurred on a busy Saturday morning. I was the only attorney in the United States Attorney's office at the time. I told Willie Stanton he was responsible to see that Dwight Robinson reported to the Court as ordered and that I could not help him. I told Willie Stanton that he signed as Robinson's surety and he was responsible to us to see that Robinson came in.

That I did not learn Dwight Robinson was in the Continental United States until I heard Theodore F. Stevens phone the Legal Office for the Army to find out if it was true that the Army had rotated Dwight Robinson. This occurred after Dwight Robinson was ordered to appear before this Court.

Dated at Fairbanks, Alaska, this 3rd day of August, 1954.

/s/ GEORGE M. YEAGER

Subscribed and sworn to before me this 3rd day of August, 1954.

[Seal] /s/ WALLIS C. DROZ,
Notary Public in and for the
Territory of Alaska

AFFIDAVIT OF THEODORE R. McROBERTS

United States of America,
Territory of Alaska—ss.

Theodore R. McRoberts, being first duly sworn on oath deposes and says:

That I am Chief Field Deputy United States Marshal for the Fourth Judicial Division, Territory of Alaska.

That on the 13th day of July, 1954, I sent Deputy Marshal Robert R. Thompson to the residence of Willie Stanton, requesting that he bring Mr. Stanton to my office to see me regarding the bond of Dwight Robinson. Mr. Stanton was not home as he was working at Eielson Air Force Base, but his wife was there and came to my office. I advised her that Dwight Robinson was held in jail at West Virginia and that Willie should get in touch with me immediately. I advised Mrs. Stanton that if they would put up the cost of transportation to send a Deputy down to West Virginia to bring Robinson

back to the Territory of Alaska, we would go get him, otherwise we would have to go ahead and get him and the full amount of their bond would be forfeited. I told Mrs. Stanton to have Willie call me at my residence as soon as he arrived home that evening. That night, between the hours of 5:30 p.m. and 6:00 p.m., Willie Stanton called my residence. I was not home at the time, but Mrs. Melville McRoberts answered the telephone. Willie Stanton told her to tell me to call Mr. Warren A. Taylor, that he would know what I was talking about.

That on the 14th day of July, 1954, approximately 6:00 p.m., I met Willie Stanton on Second and Lacey Streets. That at that time I told Willie Stanton that we would give him the opportunity to put up the actual expense for a Deputy to travel to West Virginia and transport Dwight Robinson back to Fairbanks. I told him that we had to get him right away as they were holding him in West Virginia for us. That if he would deposit the money in our office forthwith, it would be to his advantage, otherwise action would be taken to collect the full amount of the bond.

That Willie Stanton refused to discuss the issue with me and referred me to his lawyer, Warren A. Taylor.

That at no time did Mr. Stanton come up to the office and offer to post the amount of the transportation for a Deputy Marshal and Dwight Robinson and other expenses involved in transportation from West Virginia.

Dated at Fairbanks, Alaska, this 2nd day of August, 1954.

/s/ THEODORE R. McROBERTS

Subscribed and sworn to before me this 2nd day of August, 1954.

[Seal] /s/ T. F. STEVENS,
Notary Public in and for the
Territory of Alaska

AFFIDAVIT OF ALBERT F. DORSH

United States of America,
Territory of Alaska—ss.

I, Albert F. Dorsh, being first duly sworn on oath depose and say:

That I am the United Marshal for the Fourth Judicial Division, District of Alaska.

That with reference to the statement made by Willie Stanton, as bondsman for Dwight Robinson, I have questioned all available deputies and have been assured that no such statement was made to Willie Stanton to the effect that the bondsmen on Dwight Robinson's appearance bond had been exonerated or released by said Dwight Robinson's being taken into custody by the military. That as a matter of fact, none of the deputies in my office or myself knew the whereabouts of Dwight Robinson or that he had been rotated to the Continental United States until we were so informed by the United States Attorney after the bond in this case

was forfeited upon Robinson's failure to appear in this Court on June 4, 1954.

Dated at Fairbanks, Alaska, this 3rd day of August, 1954.

/s/ A. F. DORSH

Subscribed and sworn to before me this 3rd day of August, 1954.

[Seal] WALLIS C. DROZ,
Notary Public in and for the
Territory of Alaska

[Endorsed]: Filed August 3, 1954.

[Title of District Court and Cause.]

ORDER

The Government was represented by Theodore F. Stevens, United States Attorney; the bondsmen of the defendant were present in person and represented by Warren A. Taylor.

Mr. Taylor submitted the bondsmen's Motion for the Remission of the Forfeiture of the Bond of the defendant without argument.

Mr. Taylor moved the Court for a Continuance of the bondsmen's Motion for the Remission of the Forfeiture of the Bond in the case.

It was Ordered that the Motion be denied.

Mr. Taylor submitted the Motion for the Remis-

sion of the Forfeiture of the bond without argument.

It was Ordered that the motion be denied.

Entered in Court Journal August 3, 1954.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS
August 3, 1954

Theodore F. Stevens, United States Attorney, of Fairbanks, Alaska, attorney for Plaintiff.

Warren A. Taylor, of Fairbanks, Alaska, attorney for sureties for the above named Defendant.

Be It Remembered, that upon the 3rd day of August, 1954, the above entitled cause came on for argument before the Honorable Harry E. Pratt, District Judge.

The Court: Well, I have just this moment received the Affidavit.

Mr. Stevens: Yes, your Honor. I didn't get Mr. Taylor's Affidavits until last evening at five o'clock, and these have just been finished by my office.

The Court: We will take a fifteen minute recess.

(Thereupon, a fifteen minute recess was taken.)

The Court: Are you ready for hearing the case of United States vs. Dwight Robinson, No. 1815 criminal? Are you ready?

Mr. Taylor: No, your Honor. If the court please,

I would like a little additional time. There are some matters in these affidavits that I would like to have a chance to refute.

The Court: How much time do you need?

Mr. Taylor: I would like to have until Friday, your Honor, till Friday morning.

The Court: Well, I want to get this off our hands today. You ought to be able to if you read it over in the meantime just as I have.

Mr. Taylor: Well, your Honor, there is something that came up here that I talked with a Captain, Major at Eielson Air Force Base that had promised to come in, and he has not showed up and he, his testimony would be very important.

The Court: Is there any reason why I shouldn't give Mr. Taylor until 3:30 to file other Affidavits?

Mr. Taylor: Sir?

The Court: I was asking the District Attorney if there was any particular objection on his part to allowing you until 3:30 to file any further affidavits?

Mr. Stevens: I believe, your Honor, it is his motion. Under this procedure I understand you can take testimony if he does not have time to make affidavits. He could call a witness if your Honor would permit it.

The Court: No, I don't think we want to go into oral testimony.

Mr. Stevens: Very well, I have no objections.

The Court: Well, I will give you until 3:30.

Mr. Taylor: I don't believe that would be any good, your Honor. Might as well rule right now.

The Court: All right, we will go ahead.

Mr. Stevens: It was your motion, Mr. Taylor.

Mr. Taylor: I believe I will waive argument, your Honor. I will submit it upon the affidavits. I think we have shown there that the defendant was not a fugitive from justice and was taken out of the jurisdiction of this court by the United States.

The Court: Motion of the defendant for remission of forfeiture of bond is denied.

Mr. Taylor: I would like to give—well, I will file that. I am going to appeal that, your Honor, to the Circuit Court.

[Endorsed]: Filed August 9, 1954.

[Title of District Court and Cause.]

MOTION FOR RE-ARGUMENT AND RECONSIDERATION OF MOTION FOR REMISSION OF BOND

Comes Now Willie Stanton and Mildred C. Stanton, sureties for the above named defendant, and move this Court for a rehearing and reconsideration of Motion for Remission of Bond.

This Motion is made upon the grounds that to allow the Court's ruling of August 3, 1954 to prevail would result in gross injustice to the said sureties, in that the said Dwight Robinson was not a fugitive from justice, and was forcibly taken from the jurisdiction of this Court by the U. S. Army and without his consent and with knowledge on the

part of the Army that said Dwight Robinson had been released on bail and was not to depart said jurisdiction.

This Motion is based upon the affidavits submitted in support of said sureties' previous Motion.

/s/ WARREN A. TAYLOR,
Attorney for Sureties

Acknowledgment of Service attached.

[Endorsed]: Filed August 4, 1954.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

August 6, 1954

Theodore F. Stevens, United States Attorney of Fairbanks, Alaska, attorney for Plaintiff.

Warren A. Taylor, of Fairbanks, Alaska, attorney for sureties for the above named Defendant.

Be It Remembered, that upon the 6th day of August, 1954, the above entitled cause came on for argument before the Honorable Harry E. Pratt, District Judge.

The Court: 1815 criminal. Very well. Proceed.

Mr. Taylor: If the court please, in the matter now before the court we feel that the facts as shown by the affidavit, your Honor, are sufficient to show that the bondsman, Willie Stanton and Mildred C. Stanton, should be relieved of the penalty of the bond upon the grounds that the absence of the de-

fendant from the Territory was not willful, but it was caused by the act of the United States, the obligee on the bond.

Furthermore, your Honor, there was no time nor place set in the bond for which the defendant was to appear.

Now, in the, the courts have repeatedly held, and in the United States Supreme Court, your Honor, in Volume 83 at Page 366, Taylor vs. Taintor. That was a case in which a man named McGuire was out on bond and he went into the state of New York and he was picked up there and incarcerated, and his home was in the state of New York. While there, upon a requisition from the governor of Maine upon the governor of New York he was seized by the legal officers of New York and by them delivered over to the proper officers of the State of Maine, by whom he was immediately and against his will removed to that state. He was charged with burglary in Maine, and after, and in this case he had been out on bond in the State of New York and though the bond was forfeited, but the Supreme Court in the state gave judgment. The Supreme Court gave judgment for the plaintiff on the bond and then they went to the Supreme Court of Errors for Fairfield County and it finally wound up to the Supreme Court.

Now, the court in touching upon this matter, your Honor, said, "It is settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the

law. Where the principal dies before the day of performance, the case is within the first category. Where the court before which the principal is bound to appear is abolished without qualification, the case is within the second. If the principal is arrested in the State where the obligation is given and sent out of the State by the governor, upon the requisition of the governor of another State, it is within the third. In such cases the governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion. But if he act, and the fugitive is surrendered, the State whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, ipso facto, lose their binding effect."

In other words, the bond has no effect where the party has been sent out of the State by the governor of the State where he was under bond, honoring a requisition of another state.

Now, in the present situation of Dwight Robinson and the facts are not disputed in the affidavits, he was out under bond and Stanton and his wife were the bondsmen. He was taken into custody by the Army and held in custody at Ladd, at Eielson Field and he was court-martialed thereafter for a minor offense and knowing that the Army, the Army knowing that the man was out under bond and exercising a sovereign power of the United States, took Robinson out of the Territory of Alaska to Camp

Lewis, Washington, discharged him from the Army and gave him ten dollars, made it impossible for him to come back. In this case two of the categories that was mentioned in this case were present. Not only one, but two, because it was by the acts of the United States that Robinson was taken out of the Territory of Alaska. That was an act of the obligee. Furthermore, it was not willful and as he went out, was taken out by the United States, it was by act of law, so he was lawfully taken out against his will to another jurisdiction from which he could not get back because he did not have the funds with which to come back, not but what he would want to come back because after he was out there and finally made his way to his sister's home in Niagara Falls, your Honor, he wrote to me where he was and said he didn't have a job and explained how they had taken him out. He had tried to get word in here and at the same time, according to the affidavits and the exhibits, the Army knew that Robinson was under bond.

Upon receiving the letter I made a copy and gave it to Mr. Stevens because Dwight Robinson said, I want to come back; I would like to come back, but I haven't got any money. If they want to take me back, I will be waiting here. He was waiting there and he came back. So where there is no willful default on the part of the obligor on the bond, your Honor, that would be Stanton, or no willful default on the part of the person for whose security the bond is given, the bond would be remitted. It is exonerated in its entirety and also, I

believe on this bond, your Honor, if the court looked at the bond, there is no time for Robinson to appear. He was here before the bond was forfeited. He was here because he gave his address, told where he was and was brought back, so he wasn't in willful default.

Now, the courts, as the courts have said, the bond is the same as any other contract, and that is in the case of Joelson vs. United States, 287 Federal Reporter, Page 106, and same as any other bond, your Honor, that if through the act of one party the bond is, it is incapable of fulfilling the bond the person who is liable for the penalty bond is excused and as I pointed out before the bond ran to the United States of America. The United States of America was responsible for the removal of Robinson from Alaska, so he couldn't appear, so the bond is exonerated, your Honor.

Now, we have another, the case of—and this case, Your Honor, goes much farther than the, than these other cases. The case of United States vs. Burl, and that was for the Eastern District of Illinois and is reported at Page 583 and in 67 Federal Supplement, Page 583.

Now in that case, your Honor, that was under the new rules, it says "Under statute permitting remission of penalty upon forfeiture of bail bond, court has discretion to remit the whole or part of the penalty only if it appears that there has been no willful default, that a trial can be had, and public justice does not otherwise require enforcement of the penalty, but if default is willful, court

has no discretion to remit any part of the penalty." Now, it is certainly apparent in this case that there was no willful default. The man appeared for sentence here, your Honor. He was sentenced. The court has extracted its pound of flesh from Robinson. Now, they want another pound of flesh from Willie Stanton. The government has not been harmed in any way by this because they were the ones that instituted and put in force, put in the force that removed Robinson from the Territory of Alaska which prevented him appearing here for sentence after the appeal was dismissed by myself, as attorney for Mr. Robinson.

Now, in the case of United States vs. Burl, the principal in that case was taken, the principal in the bail bond to a Missouri State court was taken from its jurisdiction by Federal authorities to answer a criminal charge in the District Court in Illinois where he was released on bond, "exercise by Missouri court of its prior custody and jurisdiction over principal upon his return to Missouri while at liberty on bond to federal court was an 'act of law', and consequent default on bond to federal court was not 'willful' so as to deprive that court of discretion to remit penalty of bond."

That is a case, your Honor, where a man was out on bond, goes into another state and he is surrendered by a bondsman there to answer for a Federal offense, but still the courts hold that it was not willful and the penalty should be remitted.

I don't like to read all of this case, your Honor. It is quite long. I would like to point out pertinent

parts. They cite quite a number of cases. It says "Under the controlling decisions which have interpreted and applied the above statute it gives the court discretion to remit the whole or part of a penalty only when there has been no willful default upon the part of the principal." In this case, that would be Robinson. "That the surety or sureties on the bond may have exercised good faith and diligence in their efforts to produce the principal in court pursuant to the conditions of the bond, that the principal may have appeared after default for trial or other disposition of his case and that the government suffered no injury gives the court no discretion under the statute to remit the whole or any part of the penalty of the bond, if the default of the principal was willful within the meaning of the statute."

Now, in that case they cited the Taylor vs. Taintor, the one that I read awhile back which is cited 83 U.S. 366; 16 Wall. 366, 21 L.Ed. 287; Continental Casualty Co. vs. United States, 314 U.S. 527, 530-532, 62 S. Ct. 393, 86 L. Ed. 426; United States vs. Capua et al, 7 Cir. 94 F. 2d 292. "The facts here show that Burl, as soon as he was released after serving the sentence imposed against him by the Missouri state court to which he was already under bond at the time he gave bond to this court, was brought before the court so that, notwithstanding his default, sentence might be imposed or other disposition made of his case and the facts further show 'that public justice does not otherwise require the same penalty to be enforced'.

The single and controlling question, therefore, is whether or not Burl, the principal in the bond, was guilty of a willful default when he failed to appear in this court on June 12, 1944."

"Counsel for the government frankly admit, and quite properly so under the evidence, that the default of the principal Burl was not willful in the sense that it was intentional. It was not his idea and it was not his will that the surety on his Missouri bond should seize and surrender him to the Missouri court and keep him away from this court on June 12. But, the government says, his default was willful in the eyes of the law on two counts, namely, (1) that it was his willful act that caused him to be placed under the bond in Missouri which, brought about his default of his bond here, and (2) his act in leaving this district after giving bond here and thus placing himself within reach of his surety in Missouri was a willful act."

"Both counts are factually correct. That those facts or either of them show that his default here was willful under the law I am not convinced. It is undoubtedly the general rule that if the principal in a bail bond given in a federal District Court, after enlargement on bail, is subsequently detained by state authorities on a criminal charge and is thus caused to default his federal bond, such default is willful. Though such default was caused by the exercise of the legal authority of the state such cause is said not to be an 'act of the law' within the meaning of the language of Taylor vs. Taintor, supra, that, 'It is the settled law of this

class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law.' " In this case the default, your Honor, was by the act of the obligee and the act of law as it was the Army, an instrumentality of the United States, exercised its power, its authority to take Robinson out of the territory of Alaska.

I have talked quite a bit about this, your Honor. Also, the case of Taylor vs. Taintor which seems to be a leading case. It is an old case, but it was a Supreme Court case and should be quite persuasive in this case.

So we have now, your Honor, as exhibits in this case, our motion for the remission and for a rehearing, and we have an affidavit in support of a motion by myself in which I stated, I set out the various matters and how I had written to Mr. Robinson's home at both West Virginia and Niagara Falls, which he gave as his address, and I got a letter back from him stating that the circumstances of his being taken out of the Territory, that he had tried to get in touch with the court here, he had tried to get in touch with me, but the Army officers were not cooperative, although prior to that time they had always been very cooperative, and they took him out and turned him loose without any money. He borrowed thirty dollars and finally got home, back to Niagara Falls. His mother sent it to him, and he was broke when he got my letter and he made no effort to evade the officers. He said, I

am here; I have no money; I have no job; I cannot get back. I then contacted Mr. Stanton. I told him. Mr. Stanton immediately went to the office of both the Alaska Airlines and to the Pan-American Airlines, found out that he could get him back here, two hundred fifty-eight dollars by first class, two hundred twenty some dollars by air coach to Seattle and on up here, and was in the process of getting the tickets, your Honor, when the notice came out in the paper that Robinson had been picked up and was being returned to Fairbanks. He had done everything he possibly could, your Honor, so the letter from the principal, from Mr. Robinson shows he was not attempting to evade the penalty of it, and we have, your Honor, the copy of certificate from Edwin H. White, Captain of the Judge Advocate General's Department as to what steps was taken with Robinson at the base, and how they took him out on the 2nd day of March, 1954, without any notice to this court that he was being taken out, and in spite of the fact on February the 4th they received a letter from Mr. Hall stating what the status of the case and said that Mr. Robinson had been released on a five thousand dollar supersedeas bond and will be out on bond until the appeal is heard in San Francisco, California, but in spite of the fact, your Honor, the instrumentality of the government, the Army, took Robinson outside. Now, the affidavit of Willie Stanton and Mildred Stanton. Mrs. Stanton came up and tried to surrender this man after he was picked up and put in the Stockade at Eielson. The Marshal said no, he

is in custody out there, so they forgot about it. In a case like that—they are colored people. They are not familiar with this procedure. The Deputy Marshal says he has been picked up by the Army. You have got nothing to worry about. The bond is exonerated. They naturally thought it was until I got ahold of him and told him that Robinson had to be here, so in fact Mr. Stanton was willing to send the money to have the airplane company in Niagara Falls notify him that there was a ticket there and he could come back under his own power, so he certainly was not a fugitive from justice. He wasn't trying to evade the penalty, so his presence in the United States and not in this court at the time when he was in a position that he couldn't even be notified. There was no particular time for him to appear here and the Supreme Court, or the case that I cited a few moments ago says there must be a particular time, that he is to come back. That is in the case of Joelson vs. the United States in Volume 287 of the Federal Reporter, and if there is not a particular time and place mentioned that if he appears subsequently the bond will be exonerated.

Now, as Mr. Stanton says, he is not a man of affluence. He has got some property here he is paying down, got one basement, it is a concrete basement that he by his own labor has tried to build it up, trying to accomplish something. You might say he is a fairly high-class colored boy and he wanted to help Robinson. Robinson was a comparative stranger and he didn't like to see him in jail,

and as a matter of friendship to a person of the same race he went on Robinson's bond so, your Honor, under the circumstances Robinson was not trying to make any willful default of being here. Stanton tried everything he could to get him back. Robinson came back and we advised him where Robinson was. His letter, which is attached in there, your Honor, shows that he was not trying to evade coming back to the Territory, and he just says that they took him out and he got a wire that I sent to him. He says, "I don't have any money to come back to Alaska the Army didn't pay me any money at all I try to get them to let me come and see you before I left but they would not. and Mr. Jones told me that they would take care of everything. I been trying to get a job so I would pay you but I haven't found one yet so if they did not fix it and they still want me I will be here when they come after me because when I left Alaska I didn't leave on my own. Don't get me wrong Mr. Taylor if I had the money I would be to glad to come back but now I don't have anything and no money either Mr. Taylor I'm going to pay you as soon as I get able or as soon as I get a job but when I left Alaska I thought I were a free man. I knew that I owe you but the way they told me that the rest of that stuff were over with so I be here if they want me." That, your Honor, is all indicative of innocence on the part of Mr. Robinson of willful default in surrendering himself.

Mr. Stevens: Your Honor, I call your Honor's attention to the fact that the letter Mr. Taylor just

read from his client, Mr. Robinson, was written on June 10. My records show that on May 12 we notified the bondsmen to produce Dwight Robinson on May 17th. We extended that to May 28th. Finally we gave them another notice to produce Dwight Robinson on June 4th, and on all those occasions it was an order of this court that he appear for sentencing.

Mr. Robinson went outside to be discharged right around the first of March. He did not even contact his attorney until after June, until after Mr. Taylor had notified him by wire that he had better get here. We believe that there is no doubt that his default is willful. He was discharged in Seattle. It would have been just as easy for him to make his way to Alaska and back here as it would have been to go to West Virginia or New York. He had, he was free. He was not under any compulsion and that was in March and it was not until June the 4th, until we finally absolutely said this is the last extension, please have Mr. Robinson here, and it was not until after that last extension was up that Willie Stanton started getting worried, because on each occasion as the affidavits of the Marshal show he told the Marshal to see his attorney, Mr. Taylor, and that is all there was to it.

I have given my affidavit. I talked to the Marshals, tried to get them to get Willie Stanton to come up and see me. No, he wouldn't come up. When Mr. Stanton made these bonds, and your Honor, I would call your Honor's attention to the fact that Willie Stanton is no pauper. On the 17th

day of November, 1953, he signed a bond in the amount of five thousand dollars for Douglas G. English; on the 30th day of January, 1954 he signed a bond for a thousand dollars for D. Tracy Frederick; on the 24th day of December, 1953, he signed a bond for two hundred fifty dollars for Harry Pitka; on the 18th day of December, 1953, he signed a bond for two hundred fifty dollars for Charles Singleton; on the 28th day of December 1953, he signed a bond for four thousand dollars for Robert W. Snodgrass; on the 23rd day of November he signed a bond for two hundred dollars for Anzoil Simon; on the 30th day of January he signed a bond for a thousand dollars for Willie Mae Walters; on the 20th day of April he signed a bond for five hundred dollars for Harding Perry; on the 20th day of April, 1954, he signed another bond in the amount of five hundred dollars for Willie Mae Walters; and on that same date another for three hundred dollars for Anzoil Simon; and on the 5th day of May he signed a bond for five hundred dollars for Patricia Surber. He was on a bond in this court in case No. 1821 in the amount of four thousand dollars for Robert Snodgrass. He signed another bond for Tracy Frederick for two thousand dollars on February 24, 1954, and he was on this bond for five thousand dollars. On each occasion, your Honor, when he signed a bond of over a thousand dollars I personally talked to him, and I personally asked him, please, did he know what he was doing. I had him get Mr. Littlefield make an appraisal of his property. He did so.

Mr. Littlefield appraised his property above twenty thousand dollars. There was nothing we could do to make this boy see the responsibility he was taking. He knew what he was taking. He knew the responsibility. His principal went outside in March and had Dwight Robinson remained in custody of the Army up until June 4th when he was ordered to be here then Mr. Taylor's cases would be in point. As it is, he was free in March. He was free in March, April, May and June. He didn't appear here until July, and, your Honor, he didn't appear here voluntarily. He appeared here only after the FBI all over the country was alerted to look for this man.

He was picked up on a bench warrant issued by this court and he was transported here under guard, and I believe that this is a more serious case than a man who has merely had a Complaint or an Indictment brought against him. This man was convicted of bank robbery, had a three and a half-year sentence ahead of him, and he did not appear.

Now, it was not impossible for him to be here. It was not impossible for him to contact either his bondsmen, his attorney, my office or the court through the Clerk or the Marshal, let anyone know where he was. He did not do so.

We gave him an extension from May 12th to June the 4th, almost a month, your Honor, and we did not finally bring him in here until the 26th day of July of this year.

Now I call your Honor's attention to the case of United States vs. Davis, also an Illinois case, 202

Federal 2nd, at Page 621. In that case the defendant was indicted on a White Slave case, was put out on bond of ten thousand dollars. He failed to appear for trial and a Warrant was put out for his arrest. He was picked up a week later by the FBI and the court forfeited the full ten thousand, although the man had not in fact been proven guilty even, and the court of appeals said it was within the discretion of the court to remit any part or to refuse to remit any part, and the court refused in its discretion to remit any part of the ten thousand dollar bond, and the case was upheld on appeal and we believe that that is what Rule 46f says. This court in its discretion can remit the whole or any part of this bond and the court failed to accept Mr. Taylor's arguments the last time. He made a motion for a reconsideration and if your Honor will look at the grounds he raised in his motion for reconsideration I believe Mr. Taylor was asking for time to bring in the witnesses that he so strenuously objected that he had.

For that reason we were prepared to meet the contentions that Mr. Taylor might raise by these witnesses. He has produced no more facts, no more affidavits, no witnesses. The same case he submitted to your Honor last Tuesday, I believe it was. The situation is still the same. Mr. Robinson was voluntarily absent from this court when you made an order he appear. You made that order three times, your Honor. On two occasions you granted leniency. I believe the government has incurred a great deal of expense in holding court, in alerting the

FBI, in sending a guard to West Virginia, and even on these arguments themselves. They cost the government money, and I believe that Mr. Robinson caused the United States at least in the damages of five thousand dollars, that is what Mr. Stanton agreed to pay in the event his principal would not appear. He would pay his five thousand dollars, and we ask that your Honor still continue your order that the forfeiture and the judgment on the forfeiture be enforced.

Mr. Taylor: If the court please, I would just like to say a few words. Evidently Mr. Stevens attributes to this boy—that is all he is, twenty-one years old,—boy the intelligence of a District Attorney that he knows the law in these cases. Here he is, turns him loose at Tacoma, Washington. He wasn't discharged at Camp Lewis, Washington. He was turned loose with ten dollars. He finally borrows some money, gets word to his mother. He might have been around Washington for some time and he finally gets thirty dollars and as far as he could make it was Niagara Falls. When he got there he got my wire. Where he had been in the meantime, we don't know. That is when we wrote the letter. He tried to get in touch with this court and with me.

Now, Mr. Robinson was not convicted of robbery, your Honor. He found some money in a tent and the jury convicted him of larceny.

Now, the fact that Mr. Stanton has been on a few bonds here for modest amounts is no evidence of wealth. He is not rolling in wealth, your Honor,

and the fact that he is on bonds is no indication of it. According to Mr. Stevens it is. Now, the question is, there is no dispute but what Robinson was taken away from the jurisdiction of this court by the United States and prevented from coming back. How would he come back up here? He had to fly, or take a steamship. How is he going to get back here on ten dollars? That is an assinine statement for anybody to make.

We feel, your Honor, in view of the fact that they did take him out and he was willing to come back. He said Robinson was sent out to be discharged. He was taken out by force, your Honor, and we feel he is back, justice has been done, the man has been sentenced, the bondsmen should be exonerated.

The Court: The motion will be denied.

Mr. Taylor: If the court please, I would like to move at this time, serve a motion upon Mr. Stevens for a stay of execution, your Honor, while I perfect the appeal in this case.

The Court: I couldn't quite gather what you said, Mr. Taylor.

Mr. Taylor: I said I would like to serve on Mr. Stevens a motion for a stay of execution in this case, and I will file a notice of appeal. I feel, your Honor, that this is a case that would necessarily have to be appealed.

The Court: It has already been appealed and heard.

Mr. Taylor: No, the appeal from the order denying our motion for remission, your Honor.

Mr. Stevens: Your Honor, the appeal from such

a provision, I believe the judgment in a case like this is the same as if we received a civil judgment and Mr. Taylor asks us to stay a judgment for five thousand dollars. His clients at this time have property from which we could satisfy this judgment and I would like to have some assurance for the United States that at the time the appeal is determined his clients would still have that property. Upon receipt of such assurance in some sort of a written statement from his clients we would be willing to grant the stay of execution, and I am sure the court would likewise.

Mr. Taylor: We would be willing to have him put under a court order to restrain him from selling any property.

The Court: Where is he now?

Mr. Taylor: He is here in town, he and his wife and little baby.

The Court: Oh, I see. That is the bondsmen you are speaking of.

Mr. Taylor: Yes, your Honor.

The Court: I thought you were speaking of the defendant.

Mr. Taylor: No, I believe he is in jail.

Mr. Stevens: Well, would your Honor enter such an order?

The Court: I won't do it at this time. I don't know just what you are talking about. Serve anything on me that you have tomorrow or whenever you want to.

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

ORDER

The Government was represented by Theodore F. Stevens, United States Attorney; the bondsmen by Warren A. Taylor.

Respective counsel had argument on the bondsmen's Motion for a Reconsideration of the Motion for the Remission of the Bond in this cause.

It was Ordered that the Motion be denied.

Entered in Court Journal August 6, 1954.

[Title of District Court and Cause.]

MOTION FOR STAY OF EXECUTION

Comes Now Willie Stanton and Mildred C. Stanton, husband and wife, and move this Court for an Order staying execution of Order forfeiting bond entered in the above entitled cause until the determination of the Motion for rehearing and reargument for remission of penalty, or the determination of the bondsmens' appeal if such appeal be taken from the Court's Order.

This Motion is based upon the records and files of this cause.

TAYLOR & MILLER,
/s/ By WARREN A. TAYLOR,
Attorneys for Defendant

Acknowledgment of Service attached.
[Endorsed]: Filed August 6, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The names and address of appellants are Willie Stanton and Mildred C. Stanton, Fairbanks, Alaska.

The name and address of appellants' attorney is Warren A. Taylor, 524½ Third Avenue, Fairbanks, Alaska.

A decision was rendered in the above entitled court on the 6th day of August, 1954, for forfeiture of bond for failure of the principal to appear. Motion was made for the remission of the bond which motion was denied by the District Judge, and that thereupon the bondsmen moved for rehearing and reconsideration of the said Motion, and upon said rehearing and reconsideration the District Court again denied the Motion.

That the Court Order overruling appellants' motion is a final order and appealable under the Federal Rules of Criminal Procedure.

Willie Stanton and Mildred C. Stanton, the above named appellants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order overruling the Motion for Remission of Bond.

/s/ WARREN A. TAYLOR,
Attorney for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed August 12, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all of the proceedings in this cause requested by the defendant and appellant in his Designation of Record; also the same in the Designation of Record of the plaintiff and appellee, viz.:

1. Order of Default Judgment against Bondsmen and argument on defendant's Motion for Remission of Bond Judgment.

2. Amended Judgment and Commitment.

3. Judgment for Bondsmen, Willie and Mildred C. Stanton, to pay $5,000.00 to the Clerk of Court.

4. Motion for Remission of Forfeiture of Bond and Affidavit in support thereof.

5. Transcript of Hearing on Motion for Remission of Forfeiture of Bond.

6. Order denying Motion for Remission of Forfeiture of Bond.

7. Motion for Re-argument and Reconsideration of Motion for Remission of Bond.

8. Order denying above Motion.

9. Motion for Stay of Execution.

11. Notice of Appeal in re Remission of Bond.

12. Designation of Record (defendant's and appellant's).

13. Order of Court directing bondsmen to produce defendant for sentencing.

14. Order of Court resetting time for sentencing.

15. Transcript of Proceedings of June 4, 1954.

16. Order of Court forfeiting Bond and directing the Issuance of a Bench Warrant.

17. Warrant of Removal (No. 281) and Bench Warrant.

18. Motion for Judgment with Affidavit of Service.

19. Notice of Motion.

20. Transcript of Proceedings sentencing the defendant, ordering a Default Judgment against the Bondsmen, and resetting Hearing on Motion for the Remission of Judgment on the Bond.

21. Affidavits of Theodore F. Stevens, George M. Yeager, Theodore F. McRoberts and Albert F. Dorsh.

22. Transcript of Proceedings on Bondsmens' Motion for Reconsideration of the Motion for Reconsideration of the Remission of the Bond, already listed on pages 18 to 37 above.

23. Designation of Record of Plaintiff and Appellee.

Witness my hand and the seal of the above-entitled Court this 16th day of September, 1954.

[Seal] /s/ JOHN B. HALL, Clerk of Court

[Endorsed]: No. 14519. United States Court of Appeals for the Ninth Circuit. Willie Stanton and Mildred C. Stanton, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed: September 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14519

DWIGHT ROBINSON, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

The appellant herein states that the points upon which he intends to rely on this appeal are as follows:

1. That the Court erred in overruling the bondsmen's Motion for remission of the bond.

2. That the Order of the Court was contrary to the law.

3. That the Order of the Court was contrary to the evidence.

TAYLOR & MILLER,
/s/ By EUGENE V. MILLER,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed September 1, 1954. Paul P. O'Brien, Clerk.

No. 14,519

United States Court of Appeals

For the Ninth Circuit

WILLIE STANTON and MILDRED C. STANTON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF OF APPELLANTS.

TAYLOR, MILLER & TAYLOR,
P. O. Box 200, Fairbanks, Alaska,
Attorneys for Appellants.

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No. 14,519

United States Court of Appeals

For the Ninth Circuit

WILLIE STANTON and MILDRED C. STANTON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF OF APPELLANTS.

The facts leading to this appeal are as follows:

The primary case was styled *United States of America v. Dwight Robinson,* No. 1815 Criminal, in which said Dwight Robinson was found guilty of the crime of larceny and was sentenced by the Honorable Harry E. Pratt, District Judge of the District of Alaska, 4th Division, Fairbanks, Alaska, to three-and-one-half (3½) years in an institution to be designated by the Attorney General. The defendant, Dwight Robinson, appealed from this sentence and commitment on the 4th day of January, 1954 (Tr. 67) and on the 2nd day of February, 1954, a supersedeas undertaking was executed by appellants Willie Stanton and Mildred C. Stanton in the sum of $5,000.00.

On the 4th day of February, 1954, John B. Hall, Clerk of the District Court, District of Alaska, 4th Division, Fairbanks, Alaska, directed a letter (Tr. 29-30) to the Commanding Officer of the 450th AAA Battalion, Eielson Air Force Base, Alaska, in reply to an inquiry regarding the status of the case of the *United States of America v. Dwight Robinson;* and in this letter the Commanding Officer of the said battalion was advised that on December 29, 1953, Dwight T. Robinson was sentenced to serve a term of three-and-one-half years for the crime of larceny, but that on January 4, 1954, a notice of appeal was made to the U. S. Circuit Court of Appeals, San Francisco, California, and on the 2nd day of February, 1954, Dwight Robinson had been released on a $4,500.00 supersedeas bond.

On the 2nd day of March, 1954, Dwight Robinson was forcibly flown by the Army to Fort Lewis, Washington, where he was duly separated from the Armed Forces, with the sum of $10.00 as separation pay, that thereupon Dwight Robinson managed to secure a loan of $30.00 from his mother to go to Niagara Falls, New York, where his sister resided. On the 31st day of March, 1954, the Court of Appeals dismissed the appeal of Dwight Robinson and notice was given to his attorney to have the defendant appear for commitment on the 4th day of June, 1954.

After dismissal of the appeal, efforts were made to contact Dwight Robinson and it was discovered at that time that he had been forcibly removed by the

Army from Alaska to the Continental United States for separation from the Armed Services.

Communications were transmitted to Dwight Robinson that his presence was required in Fairbanks, Alaska, and correspondence was received from Dwight Robinson to his attorney, Warren A. Taylor, to the effect that he had no funds with which to return to Alaska and also stated in his letter that he had asked the Army officers to allow him to contact his attorney, Warren A. Taylor, so that he could be notified that he was being forcibly returned to the Continental United States, but this request was refused by Army officers (Tr. 27-28.)

That defendant's attorney, Warren A. Taylor, informed the U. S. Attorney at Fairbanks, Alaska, of defendant's whereabouts so that he could be returned to Fairbanks for sentencing. Dwight Robinson was then taken into custody in his home at West Virginia and returned to Fairbanks, Alaska, for the imposition of the sentence of the District Court. That at the time the defendant was taken into custody in West Virginia, the bondsmen were making arrangements to fly the defendant back to Fairbanks from West Virginia. On the 26th day of July, 1954, the supersedeas undertaking was declared forfeited by the District Court for the District of Alaska, 4th Division, Fairbanks, Alaska, a reconsideration of the motion for the remission of the bond was had on August 6, 1954, wherein the Court affirmed the decision of July 26, 1954, and on August 12, 1954, notice of appeal from

this judgment was filed with the Clerk of the District Court, District of Alaska, 4th Division, Fairbanks, Alaska.

STATEMENT OF POINTS.

The appellants herein state the points upon which they intend to rely on this appeal are as follows:

1. The Court erred in overruling the bondsmen's motion for remission of the bond.

2. That the order of the Court was contrary to law.

3. That the order of the Court was contrary to the evidence.

In respect to the first point relied upon, the Court should have given consideration and considerable weight to the affidavit of Dwight Robinson's attorney with respect to the forcible removal of Dwight Robinson from the Territory of Alaska by the U. S. Government for separation from the Military Services at Fort Lewis, Washington. The fact that Dwight Robinson was taken from the jurisdiction of the District Court, Territory of Alaska, by an agency of the U. S. Government, and which in fact put him beyond the reach of the District Court and unavailable for an appearance before that Court, should receive great consideration from this Court.

In respect to the second point relied upon, it is contended by the appellants that under the applicable Alaska statute, Section 66-17-52, Alaska Compiled Laws Annotated, 1949, entitled "Discharge of For-

feiture—That, if, at any time before adjournment of the Court, the defendant appear and satisfactorily excuses his neglect or failure, the Court may direct the forfeiture of the undertaking or deposit to be discharged, upon such terms or justice . . .", and in the Federal Rules of Criminal Procedure, Rule 46 (f) (2), "The Court may direct that forfeiture be set aside, upon such conditions as the Court may impose, if it appears that justice does not require the enforcement of forfeiture . . ." In *State v. Fong,* 79 Wash. 68, 139 Pac. 647, the facts of the case are not wholly unlike the case at bar. In *State v. Fong,* supra, the bail was forfeited at the time he did not appear because his attorney had advised him that a Motion to Dismiss the action would be granted, and that it would not be necessary for him to appear on that date. In the case at bar Dwight Robinson knew that his case was being appealed and while acting under this assumption that his case was under appeal, he was forcibly removed by the United States Government to the Continental United States, where he was separated from service. It must be borne in mind that the defendant informed his attorney where he was, his penniless state, and his desire to return for sentence. In *State v. Fong,* supra, it is said, "on these facts it was held to be error to deny the application to vacate, on just terms, the order of forfeiture." Appellants have no argument that upon wilful default of the principal, remission in part or in whole would not be granted. However, we have no showing of the lack of wilfulness on the part of the principals on the bond.

Under Rule 46, Federal Rules of Criminal Procedure, in the case of the *United States v. Burl,* 67 F. Supp. 583, "Bail will be exonerated where performance of conditions are rendered impossible by act of God, act of obligee, or acts of the law." In the present instance defendant was removed from Alaska by the obligee on the bond, to-wit, the United States of America, acting by and through the U. S. Army.

In 6 Am. Jur. at page 144, it is said:

> "In respect of the liability of the surety on a bail bond, the imprisonment of a citizen by legitimate orders of a military commander has the same force and effect as if he were confined upon a proper warrant from a civil tribunal. The mere circumstances of military service of the principal is not sufficient to secure the benefit of the statutes (The United States Soldiers and Sailors Civil Relief Act of 1940, as amended October 6, 1942, 56 Stat. Chapter 581), but it must appear that the military service prevented the bondsmen enforcing the attendance of the principal."

In respect to the Third point relied upon, we respectfully call the Court's attention to the uncontradicted affidavit of Warren A. Taylor (Tr. 28) with reference to the letter obtained from the Staff Judge Advocate's office, from Major Clark of the 4th AAA Battalion, Eielson Air Force Base, to Captain Damron stating that, with complete knowledge that Dwight Robinson had appealed to the Court of Appeals for the 9th Circuit from the judgment rendered in Criminal Case 1815, USARAL directed that Robinson be returned to the Z.I. for separation. Dwight Robinson

was then placed on Special Orders dated 5 February, 1954, and departed this station, Eielson Air Force Base, on March 2nd, 1954, and that this in and of itself is sufficient to show to this Court that an agency of the Government had assumed jurisdiction of Dwight Robinson and forcibly removed him from the jurisdiction of the District Court, Fairbanks, Alaska, and from the sureties residing therein.

It is the appellants' contention that defendant, Dwight Robinson's nonappearance was not wilful, but was caused by the United States Army's forcible removal of Dwight Robinson from Alaska and that Decree of Forfeiture be herein set aside.

ARGUMENT.

The District Court, without any showing of lack of wilfulness on the part of the principals on the bond now set aside the forfeiture "upon such conditions as the Court may impose if it appears that justice does not require the enforcement of the forfeiture." This, of course, is a great liberalization in favor of the obligor on the bond of the old requirement.

Federal Rules of Criminal Procedure, Rule 46, (Bail), Subdivision S (Forfeiture):

> 1. *Declaration.* If there is a breach of condition of a bond, the District Court shall declare a forfeiture of the bail.
>
> 2. *Setting Aside.* The Court may direct a forfeiture be set aside, upon such conditions as the Court may impose, if it appears that jus-

tice does not require the enforcement of the forfeiture.

In *U. S. v. Legg,* 157 Fed. Reporter, 2nd Series, 990, the Court said:

> "Bail will be exonerated where performance of the condition is rendered impossible by the act of God, act of the obligee or act of the law."

It also states in *U.S. v. Burl,* D.C. of Illinois, 67 F. Supp. 583, and in *U. S. v. Feely,* Fed. Case No. 15,082, 1 Brock 255, that

> "Where a recognizance to appear for trial is forfeited, but the accused appears at a subsequent term, the Federal Court may suspend the recognizance for good cause shown by the accused why he did not comply with the conditions."

In *Taylor v. Taintor,* 83 U.S. 366, the Court said,

> "If principal who is charged with crime and released on bail is arrested in a state where bail is given and sent out of state by the Governor, upon requisition of Governor of another state, performance of condition of bail is rendered impossible by an act of the law, and hence bail will be exonerated."

In *Joelson v. U. S.,* Circuit Court of Appeals of New Jersey, 287 F. 106, it was stated,

> "A bail bond is a contract between the Government on the one side and the principal and surety on the other."

It is apparent from the facts of this case and the law as set forth in the statutes of Alaska and the Fed-

eral Rules of Criminal Procedure that the appellants should prevail in this matter as all of the elements leading to that conclusion are very apparent in the case at bar.

There were bondsmen or sureties for Dwight Robinson, who was stationed in Alaska and a member of the Armed Forces of the United States. That he was released on bond. That although the officers of the Armed Forces of the United States knew that Dwight Robinson was to appear before the District Court for the District of Alaska, 4th Division, they forcibly removed him from the jurisdiction of the said Court and from the jurisdiction of the bondsmen or sureties, and thereby by an act of law the obligees on the bond rendered it impossible for the said sureties or bondsmen to produce Dwight Robinson before the District Court at the time and at the place prescribed by order of the Court, and that consequently the order of the District Court forfeiting the bond of the appellants herein should be reversed and the bond be exonerated.

Dated, Fairbanks, Alaska,
April 29, 1955.

Respectfully submitted,
TAYLOR, MILLER & TAYLOR,
By WARREN A. TAYLOR,
Attorneys for Appellants.

No. 14,519

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIE STANTON and MILDRED C. STANTON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

THEODORE F. STEVENS,
United States Attorney.
GEORGE M. YEAGER,
Assistant United States Attorney.
Fairbanks, Alaska,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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IN THE

United States Court of Appeals

For the Ninth Circuit

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Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

QUESTION PRESENTED.

Did the District Court for the Fourth Judicial Division, District of Alaska, abuse its discretion in an arbitrary and capricious manner by refusing to remit the judgment of $5,000.00, taken against appellants, as sureties, upon default of an appearance bond.

COUNTERSTATEMENT OF THE CASE.

Dwight T. Robinson was found guilty of larceny upon a government reservation on the 7th day of December, 1953, before the District Court for the

Fourth Judicial Division, District of Alaska. Robinson appealed to this Court (No. 14,274); however, said appeal was dismissed on March 31, 1954.

Appellants executed as sureties for Dwight Robinson an appearance (or supersedeas) bond in the amount of $5,000.00, said bond having been filed on February 2, 1955, at which time Robinson, a private in the regular army, was released by the federal prison authorities. He returned to duty with the 450th Anti-Aircraft Artillery Battalion at Eielson Field, Alaska. The commanding officer of that unit immediately contacted the clerk of the lower Court to ascertain Robinson's status, and was informed by the clerk that Robinson would "be out on bond until the appeal is heard in San Francisco, California". (Tr. 30.)

Upon receipt of the information that Robinson was released on bond, the Army reactivated proceedings to separate Robinson from military service. These separation proceedings had been interrupted by the civil authorities of the federal government when Robinson was demanded for prosecution in connection with the larceny charge. The cause of his separation had occurred *prior* to his apprehension and conviction in the lower Court. (Tr. 28.)

Robinson was separated from the service at Ft. Lawton, Washington, on or about March 28, 1954. (Tr. 38.)

This Court's mandate in the *Robinson* case was entered and spread on the record of the District

Court on May 11, 1954. At that time, the bondsmen (appellants) were ordered to produce Robinson on May 17, 1954. This order was continued until May 28, 1954 (informally) and on that date, appellants were given a further extension of time until June 4, 1954 to produce the defendant. (Tr. 3.) On June 4, 1954, the Court ordered the bond forfeited and a bench warrant issued for Robinson's arrest, he was thereupon declared a fugitive from justice.

On the 12th day of July, 1954, Robinson was apprehended in the Southern District of West Virginia. (Tr. 9.) He had apparently been in Niagara Falls, New York on June 10, 1954.

Following the bondsmen's refusal to transport Robinson to Alaska, (Tr. 40) the United States removed the subject to Fairbanks and filed a motion for judgment in the amount of $5,000.00 against the sureties. Judgment was entered upon July 26, 1954 (Tr. 22) for the full amount of the bond, pursuant to Rule 46(f) of the Federal Rules of Criminal Procedure. No motion to set aside the forfeiture was filed in this case prior to said judgment.

However, following entry of the judgment, appellants moved the Court for remission of the bond forfeiture of July 26, 1954, requesting that the forfeiture be set aside on the grounds that the default of Robinson was not wilful and that the default was occasioned by the "acts of the obligee" on the bond. This motion was denied upon August 3, 1954. Counsel for appellants then moved for reconsideration of

the motion to remit on the ground that the Court's ruling of August 3, 1954, would result in "gross injustice" to appellants and also that Robinson was "forcibly taken from the jurisdiction of this Court by the U. S. Army and without his consent and with knowledge on the part of the Army that said Dwight Robinson had been released on bail and was not to depart said jurisdiction". (Tr. 46.)

The motion for reconsideration was denied, and it is apparently from this order, dated August 6, 1954, that appellants have appealed to this Court. (Tr. 67.)

JURISDICTION.

The jurisdiction of the Court below to enter the judgment against appellants as sureties was based upon Rule 46(f)(3) of the Federal Rules of Criminal Procedure. The motions pertaining to remission of the forfeiture were considered by the Court pursuant to Rule 46(f)(4) of the same rules.

This Court has jurisdiction pursuant to 28 U.S.C. 1291.

SUMMARY OF ARGUMENT.

The judgment of July 26, 1954 against appellants has not been attacked. Only the propriety of the lower Court's refusal to remit the judgment against appellants is before this Court. It is not clear from the record which of the orders of the lower Court

pertaining to remission of the judgment upon the bond forfeiture has been appealed. However, both orders pertaining to remission of the judgment were denied by the district judge in the reasonable exercise of his discretion. No showing has been made by appellants that the Court's refusal to remit the bond or any part of it was arbitrary or capricious, nor have appellants shown that the default of their principal, Robinson, was occasioned by the acts of the obligee.

ARGUMENT.

A trial Court has the power under Rule 46(f)(4) to remit the judgment "in whole or in part" if it "appears that justice does not require the enforcement of the bond forfeiture". (Rule 46(f)(2).) This implies the exercise of sound discretion, with regard to what is right and equitable under the circumstances. (*Smaldone v. United States,* 211 F. 2d 161 (10th Cir. 1954).) No obligation was placed upon the government to show the extent of its damage. (*U. S. v. Davis,* 202 F. 2d 621, 625 (7th Cir. 1953) *cert. denied*, 346 U.S. 819.)

In the present case, Judge Pratt had given appellants several extensions of time in order to produce Robinson for re-sentencing. Appellants' attorney was also Robinson's attorney. He had notice of this Court's action pertaining to Robinson soon after the entry of its decision on the 31st day of March, 1954. No attempt was made to produce Robinson even after

appellants' attorney received notification of his whereabouts. In fact, no attempt was made to return Robinson to the jurisdiction of the trial Court, even after the bond forfeiture, when appellants were informed specifically that Robinson was incarcerated in West Virginia. (Tr. 35, 41.) In view of this record, no valid claim can be made that appellants have demonstrated that "justice does not require the enforcement of the forfeiture".

Appellants have repeatedly signed bail and appeal bonds (Tr. 59, 60) and were cautioned concerning their obligation to the United States in the event of default. (Tr. 36.) They qualified as bondsmen to the extent of $20,000.00; yet, at no time did they comply with the order of the Court pertaining to Mr. Robinson.

Appellants' motion for reconsideration (Tr. 46) also failed because they could not establish that Robinson "was not to depart" the jurisdiction of the lower Court. The bond executed by appellants is not a part of the record before this Court; no condition that the defendant, Robinson, was to remain in the "jurisdiction" of the lower Court is shown, nor did said bond contain such a condition.

NO ACT OF OBLIGEE PREVENTED ROBINSON'S APPEARANCE.

The original order denying the motion to remit was also proper. While proof that the default was not wilful was necessary prior to Rule 46(f) (see, *U. S.*

v. Hickman, 155 F. 2d 897 (7th Cir. 1946); *U. S. v. Reed,* 117 F. 2d 808 (5th Cir. 1941); *U. S. v. Rosenfeld,* 109 F. 2d 908 (8th Cir. 1940)), this proof is no longer necessary (*Smaldone v. U. S., supra,* p. 163). The only issue raised by said motion was, therefore, whether the acts of the obligee prevented Robinson from complying with the order of the District Court.

The landmark case of *Taylor v. Taintor,* 83 U.S. (16 Wall.) 366 (1872), relied upon by appellants, does not substantiate the claim of the bondsmen. In that case the Court ruled that sureties on an appearance bond before a Connecticut Court were not discharged because their principal had been forcibly extradited from New York to Maine by a Governor's warrant. At page 372, the Supreme Court said:

> "When the recognizance was forfeited for the non-appearance of McGuire, the action of the governor of New York, pursuant to the requisition of the governor of Maine, had spent its force and come to an end. McGuire was then held in custody under the law of Maine to answer to a criminal charge pending there against him."

Robinson was not held by anyone. He was released from the military service in the State of Washington, fully at liberty and able to contact his bondsmen. He traveled to the east coast of the United States rather than return the comparably short distance to Alaska. No act of the obligee caused his default, for Robinson was in no way restrained or prevented from appearing by the United States.

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their